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- L. Ex. 38 [Proposed Pole Attachment License Agreement, 8/20/07]

I. INTRODUCTION

This lawsuit is about a small public utility district operating on a not-for-profit basis in Pacific County, doing business with three large for-profit telecommunications companies. Respondent Public Utility District No. 2 of Pacific County (the “District” or the “PUD”) is consumer-owned and is regulated by a locally-elected Board of Commissioners, not by the Federal Communications Commission (“FCC”) or the Washington Utilities and Transportation Commission (“WUTC”), as investor-owned utilities are. The three Appellants [Comcast, Charter, and CenturyTel (the “Companies” or “Appellants”)] attach to and maintain their communications equipment on electric poles owned by the District -- poles purchased, maintained, repaired, and replaced with public funds.

The District was forced to bring this lawsuit because the Companies refused to: (1) pay at new pole attachment rates (updated for the first time in 20 years) adopted after PUD Commission public meetings and hearings; and (2) execute new pole attachment agreements with the District to replace decades-old agreements that were terminated on proper notice; or, alternatively, (3) remove their equipment from the District’s poles.

The District’s pole attachment rates had not changed since 1987, despite increases in costs. The District developed new rates in consultation with an experienced Pacific Northwest rate consultant, and adopted new rates lower than the consultant recommended.

The District communicated with the Companies regarding the new form of agreement over a year and a half period, accepting a number of the Companies' suggestions and explaining why it was not accepting others. This resulted in several different iterations of the agreement before the version at issue in this appeal.

No representatives of the Companies attended the public hearings or meetings at which the PUD Commission discussed and approved the new rates and agreement. None of the Companies assigned anyone to keep track of what was going on with respect to Commission consideration of the new pole attachment rates and proposed agreement.

After a seven-day bench trial, the Superior Court for Pacific County (Hon. Michael J. Sullivan) concluded that the District's rates and the other terms and conditions in its proposed agreement were consistent with the requirements of RCW 54.04.045. The trial court entered detailed Findings of Fact and Conclusions of Law, both substantive and awarding the District its attorneys' fees and expenses. This Court should affirm the decisions below in favor of the District.

II. RESTATEMENT OF THE ISSUES

1. Should this Court affirm the trial court's decision that the District's pole attachment rates and the other terms and conditions of its proposed agreement do not violate RCW 54.04.045?

2. Should this Court affirm the trial court's decision that RCW 54.04.045(3)(a) reflects the FCC Telecom formula and 3(b) reflects the APPA formula?

3. Should this Court affirm the trial court's award of damages to the District for breach of contract, trespass, and unjust enrichment?

4. Did the trial court abuse its discretion in awarding the District its attorneys' fees and expenses at trial, and on the Companies' Motion to Vacate and Reenter Judgment seeking relief from their untimely appeal?

5. Is the District entitled to recover its attorneys' fees and expenses in this Court and in the Washington Supreme Court resulting from the Companies' untimely appeal?

6. Is the District entitled to its attorneys' fees and expenses for this appeal?

III. SUMMARY OF ARGUMENT

A. Rates

The District had not increased pole attachment rates since 1987. It adopted new rates after a study performed by an experienced rate consultant, and subsequently analyzed and confirmed that the new rates complied with the 2008 amendments to RCW 54.04.045.

The Companies concede that Sections 3(a) and 3(b) of RCW 54.04.045 do not contain specific mathematical formulas and are not "models of clarity." To reach their conclusion that Section 3(a) is the FCC Cable formula and 3(b) is the FCC Telecom formula, the Companies

engage in a complicated, difficult to follow analysis based on FCC and WUTC pole attachment rate statutes governing investor-owned utilities -- statutes the Companies admit do not apply to consumer-owned utilities like the District. These are the very same arguments the Companies made in a Joint Motion for Partial Summary Judgment on Sections 3(a) and 3(b), which the trial court denied.

Unlike the Companies' analysis, the District's analysis simply and directly shows, for a number of different reasons based on the statutory language and the legislative history, why Sections 3(a) and 3(b) cannot be what the Companies contend, and, instead, are the FCC Telecom formula for Section 3(a) and the APPA formula for Section 3(b).

With respect to Section 3(a):

- Section 3(a) includes unusable space (support and clearance space); the FCC Cable formula excludes unusable space.¹ Therefore, Section 3(a) cannot be the FCC Cable formula. The FCC Telecom formula includes unusable space, consistent with the trial court's conclusion that Section 3(a) is the FCC Telecom formula.

- In addition, Section 4 of RCW 54.04.045 includes the option of selecting either the FCC Cable rate or the rate under Section 3(a). Therefore, the FCC Cable rate and Section 3(a) were not intended to be the same, and Section 3(a) cannot be the FCC Cable formula.

¹ One of the Companies' own witnesses conceded this point in correspondence and in sworn deposition testimony in this lawsuit.

With respect to Section 3(b):

- Section 3(b) divides 100% of the support and clearance space among the District and attaching parties. The FCC Telecom formula divides only two-thirds of that space among those parties. Therefore, Section 3(b) cannot be the FCC Telecom formula. The APPA formula divides 100% of the support and clearance space among the District and attaching entities, consistent with the trial court's conclusion that Section 3(b) is the APPA formula.

- Comments on the floor of the legislature by the sponsor of the 2008 amendments to RCW 54.04.045, which were admitted in evidence, reference the APPA formula, consistent with the trial court's conclusion that Section 3(b) is the APPA formula.

B. Non-Rate Terms and Conditions

The District's pole attachment agreements with the Companies and other attachers were very old, in some cases going back to the 1950's. Those agreements had different termination dates, and some had different substantive provisions.

- The District developed a uniform form of agreement to comply with the requirement of RCW 54.04.045 that PUD pole attachment terms and conditions be nondiscriminatory among attaching entities, and to facilitate a small utility staff's administration of the agreements.

- The new form of agreement was developed with provisions reflecting the principal concerns of a public utility: safety, reliability, and protection and stability of public funds.
- There is no requirement in RCW 54.04.045 that the District “negotiate” terms and conditions with attachers. Nevertheless, the District communicated back and forth with the Companies over a period of a year and a half, accepting a number of their suggested revisions, resulting in three different iterations of the proposed agreement.
- Virtually all of the provisions the Companies challenge in the proposed agreement appear in their own pole attachment agreements with other parties, including when CenturyTel is in the position of pole owner, as the District is here.
- Another attacher on the District’s poles executed the first version of the agreement, before any revisions at all.

* * * * *

The District’s Commission-adopted rates and the non-rate terms and conditions in its proposed pole attachment agreement do not violate RCW 54.04.045. This Court should affirm the trial court’s decision.

IV. RESTATEMENT OF THE CASE

A. Factual Background

The District is a consumer-owned utility that was formed in 1937. RP 83:25- 84:3, 86:14; FOF 1. It has approximately 17,000 electric customers and is predominantly rural, with a few small cities. FOF 2.

The District is a municipal corporation of the State of Washington, and it operates on a not-for-profit basis. RP 84:1-2; FOF 3; RCW 54.04.020; RCW 54.12.010. It is governed by an elected Board of Commissioners. RCW 54.12.010; RP 84:10-21.

The three Companies are investor-owned companies. FOF 4. Each was licensed under one or more agreements assumed from a previous communications provider in Pacific County. RP 90:18-91:15, 92:19-93:12, 94:8-14, 94:21-95:7; Exs. 1-4; FOF 7. Those agreements permitted the Companies to attach their communications equipment to the District's utility poles for use in their business operations. *Id.* The agreements were many decades old – the most recent being dated 1987, and the oldest 1950. *Id.* The District's pole attachment rates had remained unchanged since 1987 at an annual rate of \$8.00 for telephone companies (including CenturyTel) and \$5.75 for cable TV companies (including Comcast and Charter). RP 97:13-17, 98:19-22; FOF 12.

Because costs to maintain and operate the District's electrical system, including poles on which the Companies' attachments are placed, had increased significantly since rates were last adjusted, the District decided in 2004 that the pole attachment rates should be reviewed. RP 98:23-99:10. An experienced Washington-based consultant, EES Consulting ("EES"), which had performed rate studies for the District in the past, was retained to analyze the District's pole attachment rates. RP 101:16-102:3, 467:13-480:21; FOF 11.

EES issued a final report in April 2005, which analyzed the District's pole attachment rates calculated based on four different methodologies. RP 102:1-14, 104:20-105:3; Ex. 6, pp.19-23. Those formulas yielded rates ranging between \$4.99 and \$39.21. *Id.*; Ex. 188; RP 517:21-518:8. Under the statutory provision (RCW 54.04.045 – Ex. 5) then applicable to PUDs ("just, reasonable, non-discriminatory, and sufficient" rates), EES recommended that the District increase its pole attachment rate to no less than \$20.65 (calculated under the FCC Telecom formula), but closer to \$36.39 (calculated under the APPA formula). RP 106:1-7; 519:25-520:19; Ex. 6, pp. 22-23.

District General Manager Douglas Miller and Finance Manager Mark Hatfield reviewed and considered the various rates under the EES study, and the study's recommendation, and arrived at a pole attachment rate they believed was appropriate for Mr. Miller to recommend to the District's Board of Commissioners, bearing in mind that rates had not changed for many years. RP 106:11-108:19, 127:9-129:9, 134:24-136:11; Exs. 18 and 25; FOF 11.² They concluded that a rate of \$19.70 was appropriate in light of the District's costs and the time that had elapsed. RP 135:19-136:2; Ex. 25. However, because they recognized that an increase to \$19.70 was a significant increase to be accomplished in a single year, the recommendation was for a transition rate of \$13.25 for the

² Mr. Miller has worked for the District for over 30 years, in positions including Chief of Engineering, Operations Manager, and General Manager. RP 80:17-83:22.

first year (2007), with a rate of \$19.70 effective January 1, 2008. RP 107:11-20; Ex. 25.

The proposed rates were discussed at PUD Commission open public meetings, and the proposed rates were presented and recommended by General Manager Miller to the PUD Commissioners during public hearings on December 5 and December 19, 2006, and at the Commission meeting on January 2, 2007. RP 110:20-121:6; 125:23-136:2, 140:7-143:22; Exs. 7-25, 27-29, and 32; FOF 11. On January 2, 2007, the Commissioners adopted the new rates under Resolution No. 1256. RP 106:11-13, 139:16-141:2; Ex. 27; FOF 10. No representatives of the Companies attended the December 2006 public hearings or the January 2007 public meeting. RP 133:4-23, 141:18-23; FOF 13. The Companies knew the PUD Commission meetings were open to the public. RP 973:11-13, 1552:2-4. The Companies did not assign anyone to keep track of what was going on at Commission meetings regarding new pole attachment rates and a new agreement. RP 973:14-974:19, 1141:25-1143:1, 1551:19-1552:16. They never requested agendas or minutes, which would have been available to anyone requesting them. RP 346:1-12, 976:16-19.

Because the District's pole attachment agreements were very old, and differed in some respects from one another, the District also decided to develop a new form of agreement for attaching entities. RP 99:11-18. In February 2006, the District provided the required written notice under

the assigned agreements that it intended to terminate those agreements, and also advised the Companies that the District planned to implement new rates effective January 1, 2007. RP 143:24-144:16, 147:10-25, 897:10-15; FOF 8; Exs. 33 and 34.

A uniform agreement made sense to the District in order to comply with the non-discriminatory terms and conditions requirement in RCW 54.04.045. RP 99:11-100:5, 100:18-23; FOF 18. A uniform agreement also made sense because of the administrative efficiency for a small utility of having a uniform agreement, including common billing and termination dates among attachers, to avoid confusion. RP 101:1-11; 953:23-954:13; FOF 18. The District used a template agreement developed by the American Public Power Association and made revisions to make it more applicable to the District. RP 108:22-109:18; FOF 17. District management, including operations, engineering, and financial personnel, were consulted in developing the new agreement. RP 109:12-110:18; FOF 17. The proposed agreement was based on the District's fundamental concerns of safety, reliability, and stability and protection of public funds, including lowest possible cost. RP 90:5-17, 200:22-201:20, 358:14-359:6.

There were communications with the Companies regarding the proposed agreement by email, phone calls, and in-person meetings. *See, e.g.*, RP 148:4-149:18, 898:19-24; 954:24-955:6; FOF 14 and 15.³ The District provided three iterations of the proposed agreement to the

³ Additional citations to the record are in footnote 45 in Section V-D-2 below, and are incorporated by reference.

Companies over the course of a year and a half. RP 152:3-16, 898:6-18, 969:3-7; FOF 16. The District sent the first version of the proposed agreement to the Companies for review and comment in early 2006. RP 145:8-20, 147:10-25; Exs. 33-35. During the next six months, the District received feedback from the Companies. RP 148:4-17. Based on comments and suggestions received, the District prepared a revised version of the agreement, incorporating some of the suggestions (RP 149:21-151:3, 899:6-8, 1153:25-1154:17, 1547:7-1550:23; Ex. 74), and mailed it out for signature in November 2006, accompanied by a memorandum explaining the changes that had been made based on the feedback attachers had provided, and the reasons for not incorporating other suggested changes. RP 149:19-151:5; Exs. 36-37 and 131; FOF 19.⁴

The November 2006 version of the agreement generated additional discussion and comments via email, conference calls, and face-to-face meetings. RP 898:19-24. Based on this additional feedback, the District made further modifications to the agreement and then sent another revised version to the Companies in August 2007. RP 152:3-153:6; Ex. 38. The transmittal letter requested that the Companies return the signed agreement by October 31, 2007, or, if they did not want to remain on the District's poles under the terms of the new agreement, to notify the District of their plans for removing their equipment. RP 153:6-154:12; Ex. 38; FOF 20. In early October, the District sent letters to the Companies

⁴ Additional citations to the record are in footnote 46 in Section V-D-2 below, and are incorporated by reference.

reminding them of the October 31, 2007 deadline. RP 154:13-155:5; Ex. 39; FOF 20. The Companies responded that they would not sign the agreement because they believed the new pole attachment rates and other terms and conditions were unlawful and they would take legal action to prevent removal. FOF 21.

There were two other attachers on the PUD's poles besides the Companies. RP 89:14-90:3; FOF 44. One executed the first draft of the new agreement (FOF 28), and both began paying at the new rate. RP 159:13-160:11; FOF 44. Appellants Comcast, Charter, and CenturyTel, however, refused to sign, refused to pay at the new rates, and refused to remove their attachments. RP 185:25-186:10; FOF 22-24. Although the existing agreements permitted the District to remove the Companies' attachments on termination if they did not remove them (RP 95:14-97:12, 953:11-18; Exs. 1-3; FOF 25), the Companies threatened the District with litigation and potential liability for removal. FOF 21. Faced with no pole attachment agreements in place with the Companies, all of them refusing to pay at the Commission-adopted rate, and all of them refusing to remove their attachments and threatening liability if the PUD removed them, on December 28, 2007, the District filed a Complaint for Declaratory Judgment, Breach of Contract, Unjust Enrichment, Trespass, and Injunctive Relief against each Company. CP 1-14, 81-93, 120-132. The lawsuits were consolidated by agreement. CP 42-47.

In March 2008, RCW 54.04.045 was amended, with an effective date of June 12, 2008. Ex. 42 (*see* Appendix A). The District analyzed the amendments to determine how to implement Sections 3(a) and 3(b). RP 164:13-180:22; Ex. 43 (*see* Appendix B). The District updated the data to input into the new formulas, including current financial data and an updated inventory of attachments on District poles. RP 177:16-180:6, 181:15-183:2. Based on these calculations, the District concluded that the Commission-adopted rates of \$13.25 for 2007 and \$19.70 beginning January 1, 2008 were consistent with the 2008 amendments to RCW 54.04.045, with the exception that they might be too low, and therefore not “sufficient” under the statute. RP 180:23-181:14.

The Companies have never paid the District at the new rates adopted by the PUD Commission in January 2007. RP 185:25-186:4, 1183:4-7, 1571:15-25; FOF 23. The Companies have never executed the new agreement. RP 186:8-10; FOF 22. The Companies have not removed their attachments from the District’s poles. RP 186:5-7, 1183:15-17, 1572:1-3; FOF 24.

B. Procedural Background

This lawsuit involved extensive discovery, including over 25,000 pages of documents produced, plus additional financial data in electronic form totaling many thousands of pages. CP 1334; FOF (fees) 13 (*see* Appendix C-2). Thirteen witnesses were deposed, in Seattle, Portland,

Washington D.C., and South Bend, Washington. CP 1335-36; FOF (fees) 13 (Appendix C-2).

The Companies filed a Joint Motion for Partial Summary Judgment in December 2009, requesting that the Court determine as a matter of law that RCW 54.04.045(3)(a) is the FCC Cable formula and Section 3(b) is the FCC Telecom formula. CP 297-362. That motion made the same arguments with respect to Sections 3(a) and 3(b) that the Companies put forth in their trial briefs, at trial, and on this appeal. The trial court denied the motion. CP 913.

The trial court conducted a 7-day bench trial over a three-week period in October 2010. Eleven witnesses, including three experts, testified, and over 200 exhibits were admitted in evidence, including a videotape and audiotape of comments by the sponsor of the 2008 amendments to RCW 54.04.045. Exs. 194-196. Although the Companies had deposed two PUD Commissioners and one former Commissioner, and had issued subpoenas for their attendance at trial, the Companies did not call any of them as witnesses.

On March 15, 2011, the trial court issued its Memorandum Decision, ruling in favor of the District and against the Companies on the substantive issues, reserving for later argument on sworn declarations the District's request for attorneys' fees and costs, and stating it would entertain proposed Findings of Fact and Conclusions of Law. CP 1324-1327.

The District submitted substantive proposed Findings of Fact and Conclusions of Law, and a proposed Judgment, to which the Companies filed extensive objections and proposed revisions, followed by the District's Reply.⁵ The District also submitted a Motion and proposed Findings of Fact and Conclusions of Law, and a proposed Order, on its request for attorneys' fees and costs, to which the Companies objected and provided responses, followed by a Reply by the District. The Court heard oral argument on the proposed Findings of Fact, Conclusions of Law, and Judgment, both substantive and on attorneys' fees and expenses, on September 16, 2011. CP 2271; RP (9/16/11) at 1-71. On December 12, 2011, the trial court entered the Findings of Fact, Conclusions of Law, Order, and Judgment the District proposed, both substantive and on the District's request for attorneys' fees and expenses. CP 2290-2327.⁶

The Companies filed an untimely notice of appeal of the December 12, 2011 Judgment and the March 15, 2011 Memorandum Decision on January 18, 2012. CP 2328-2339.

The Companies then filed a Motion to Vacate and Reenter Judgment in the trial court seeking relief from the missed appeal deadline. The motion was briefed by the parties, followed by oral argument on

⁵ The Companies' objections reargued virtually all of their positions the trial court had rejected. CP 2239-2240, 2251-2253.

⁶ See Appendix C-1 (substantive Findings of Fact and Conclusions of Law, CP 2290-2313), Appendix C-2 (Findings of Fact and Conclusions of Law on Attorneys' Fees and Expenses, CP 2314-2320), Appendix C-3 (Order Awarding Attorneys' Fees and Expenses, CP 2321-2323), and Appendix C-4 (Judgment, CP 2324-2327).

February 17, 2012. RP (2/17/12) 1-60. The trial court entered its Order denying the Companies' Motion to Vacate on February 17, 2012. CP 2498-2500.

The District then filed a motion to recover its attorneys' fees and costs for responding to the companies' Motion to Vacate (CP 2520-2545), which was briefed by the parties, followed by oral argument on March 23, 2012. RP (3/23/12) at 1-30. The trial court entered Findings of Fact and Conclusions of Law on the District's request for fees and expenses for responding to the Companies' Motion to Vacate, an Order awarding fees and expenses to the District, and a Judgment on March 23, 2012. CP 2829-2836 (*See* Appendix D). The Companies appealed the trial court's March 23, 2012 award (CP 2843-53). That appeal was designated No. 43360-5-II, and was consolidated with the substantive appeal (No. 42994-2-II) on June 4, 2012.

In addition to filing their Motion to Vacate and Reenter Judgment in the trial court, the Companies filed a Motion for Extension of Time in this Court seeking relief from their untimely appeal. That motion was briefed, and this Court granted the motion on February 27, 2012. The District filed a Motion for Discretionary Review of that decision, as well as a Motion to Stay Proceedings in this Court pending a Supreme Court decision, which this Court granted on March 27, 2012. The Supreme

Court denied the District's Motion for Discretionary Review on June 5, 2012.⁷

The District filed a Motion in this Court on June 15, 2012 to recover its attorneys' fees and expenses for its briefing on the Companies' Motion to Extend Time, the District's Motion to Stay Proceedings, and its Motion for Discretionary Review and related Motions to Strike. On June 21, 2012, this Court denied the District's Motion, without prejudice to refile it after a decision on the merits by this Court.

V. ARGUMENT

A. Standard of Review

After a bench trial, this Court reviews challenged findings of fact for substantial evidence, and reviews conclusions of law *de novo*, considering whether the findings of fact support them. *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 778, 275 P.3d 339 (Div. II 2012), *rev. denied*, 175 Wn.2d 1008, 285 P.3d 885 (2012); *Morello v. Vonda*, 167 Wn. App. 843, 848, 277 P.3d 693 (Div. II 2012) (citing *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003)).

Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Dave Johnson Ins.*, 167 Wn. App. at 778 (citing *Sunnyside Valley Irr. Dist. v. Dickie*, 149

⁷ The District will not reargue here the substance of its opposition to the Companies' Motion for Extension of Time. The District hereby incorporates its briefing in this Court and in the Supreme Court on this issue. With all due respect, the District does not intend to waive, and expressly reserves, its right to obtain later review of this Court's February 27, 2012 decision, pursuant to RAP 13.5(d) ("Denial of discretionary review of a decision does not affect the right of a party to obtain later review of the Court of Appeals' decision or the issues pertaining to that issue.")

Wn.2d 873, 879, 73 P.3d 369 (2003)). This Court’s review is deferential, viewing the evidence and all reasonable inferences in the light most favorable to the prevailing party – here, the District. *Dave Johnson Ins.*, 167 Wn. App. at 778 (citing *Korst v. McMann*, 136 Wn. App. 202, 206, 148 P.3d 1081 (Div. II 2006)).⁸ This Court does not reweigh the evidence and substitute its judgment, even though any factual disputes might have been resolved differently. *Dave Johnson Ins.*, 167 Wn. App. at 778; *City of Puyallup v. Hogan*, 168 Wn. App. 406, 419, 277 P.3d 49 (Div. II 2012). When a trial court hears live testimony and judges the credibility of witnesses, appellate courts accord deference to its determinations of fact. *Dave Johnson Ins.*, 167 Wn. App. at 778-79; *see also Org. to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

Unchallenged findings of fact are verities on appeal. *McCleary v. State of Washington*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012); *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

The amount of damages awarded is a question of fact, which is reviewed under the substantial evidence standard. *Farmer v. Farmer*, 172 Wn.2d, 613, 632, 259 P.2d 256 (2011). The trier of fact has discretion to

⁸ The cases CenturyTel cites for the proposition that “factual findings are not supported by substantial evidence when the findings require an inference” are inapposite, because they addressed matters that relied solely on circumstantial evidence, unlike here where there was ample direct evidence to support the trial court’s findings. Furthermore, the cases cited by CenturyTel actually support the use of inferences reasonably derived from the evidence.

award damages that are within the range of relevant evidence. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990).

A trial court's award of prejudgment interest is reviewed for abuse of discretion. *Dave Johnson Ins.*, 167 Wn. App. at 775 (citing *Scoccolo Construction, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006)); *City of Puyallup v. Hogan*, 168 Wn. App. at 425.

The reasonableness of an award of attorneys' fees is reviewed for abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (Div. II 2012).

"A trial court's decision is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983).

B. This Court should reject the Companies' contention that the trial court decision should be reversed because it considered the arbitrary and capricious standard.

1. Considering the arbitrary and capricious standard was not error.

With respect to the non-rate terms and conditions in the District's proposed agreement, RCW 54.04.045 has only the "just and reasonable" standard; it has no formula or methodology. Ex. 42 (Appendix A). See Section V-D-3 and V-D-4 below discussing the evidence regarding the reasons for the various terms and conditions in the proposed agreement, based on safety, reliability, and stability and protection of public funds. By their very nature, these kinds of decisions are appropriate for

considering the arbitrary and capricious standard applied to public entities in the State of Washington.

The same is true of the trial court's consideration of the rate issues in this lawsuit. Where a statute is ambiguous, the implementing entity's statutory interpretation is accorded particular weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996); *City of Pasco v. Public Employment Relations Comm.*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).⁹ At best from the Companies' point of view, RCW 54.04.045(3)(a) and 3(b) are ambiguous: (1) the Companies admit those provisions are not "a model of clarity" (CenturyTel Brief, p. 26); (2) the trial court denied the Companies' partial summary judgment motion asserting that the statute is plain on its face as a matter of law (CP 328-62, 389-418, 419-527, 735-51, 913); (3) and witnesses for both sides spent hours at trial testifying about their differing perspectives on the correct interpretation of Sections 3(a) and 3(b).

Furthermore, the District operates within the broad authority of the PUD statute,¹⁰ and, is, therefore, accorded "substantial discretion in selecting the appropriate rate making methodology." *People's Org. for Washington Energy Resources v. WUTC*, 104 Wn.2d 798, 812, 711 P.2d

⁹ As discussed in the final paragraph of this subsection, the regulatory body here is the District's Board of Commissioners.

¹⁰ The PUD statute is to be liberally construed. *Laws of 1931, ch. 1, § 11; Shoulberg v. PUD No. 1 of Jefferson County*, 169 Wn. App. 173, 179-80, 280 P.3d 491 (Div. II 2012) (citing *Sundquist Homes, Inc. v. Snohomish PUD*, 140 Wn.2d 403, 410, 997 P.2d 915 (2000), *rev. denied*, ___ Wn.2d ___ (2012)).

319 (1985).¹¹ Rates are “presumptively reasonable,” and the party challenging rates bears the burden of proving otherwise. *Teter v. Clark County*, 104 Wn.2d 227, 237, 704 P.2d 1171 (1985); *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 804, 732 P.2d 1031 (Div. II 1987), *rev. denied*, 108 Wn.2d 1020 (1987). *Teter* and *Prisk* both upheld utility charges as not arbitrary or capricious where the public entity, as the District did here, considered consultant reports and adopted resolutions at open public meetings. *Teter*, 104 Wn.2d at 235-36; *Prisk*, 46 Wn. App. at 804-805.¹²

In addition, because rate-making matters are “highly technical” and “very factual,” *Washington Independent Telephone Ass’n v. WUTC*, 148 Wn.2d 887, 898, 64 P.3d 606 (2003), the courts accord “substantial discretion” in “selecting the appropriate ratemaking methodology.” *U.S. West Communications, Inc. v. WUTC*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997); *Cole v. WUTC*, 79 Wn.2d 302, 309, 485 P.2d 71 (1971). And,

¹¹ In suggesting that no deference is due the District’s interpretation of the statute, the Companies rely on inapposite cases. Many involve neither ratemaking nor administrative proceedings, or they are, in any event, consistent with the District’s analysis.

¹² The Companies incorrectly assert that *Teter* and *Prisk* involved rates set without statutory restrictions. *Prisk* considered limits on rate-setting authority imposed both by statute (RCW 35.95.025, which authorized a “reasonable connection charge” based on property owners’ “equitable share of the cost of such [utility] system”) and the uniformity requirement of the Washington Constitution. 46 Wn. App. at 803-04. The statute at issue in *Teter* required “rates and charges to be uniform for the same class of customers or service.” 104 Wn.2d at 230 (quoting RCW 35.67.020). In both cases, the Courts applied the arbitrary and capricious standard to determine whether the rates complied with the statute. *Teter*, 104 Wn.2d at 237; *Prisk*, 46 Wn. App. at 803-05. Furthermore, whatever the underlying statutory authority, rate-making is legislative in character, and the courts review legislative acts under the arbitrary and capricious standard. *Wash. State Att’y Gen’l’s Office v. WUTC*, 128 Wn. App. 818, 832, 116 P.3d 1064 (Div. II 2005).

“only a *practical* basis for the rates is required, not mathematical precision.” *Teter*, 104 Wn.2d at 238 (emphasis in original).

Indeed, the Companies’ own rate expert testified that “[t]he term ‘reasonable’ in the just and reasonable standard set forth in RCW 54.04.045 means not arbitrary or capricious. It means something for which a reason can be given, which does not mean the least or most favorable action for one party to another.” RP 1466:7-13.

A deferential standard of review is also appropriate because elected officials like the District’s Board of Commissioners are accountable to the public. *Wash. State Atty’ Gen’l’s Office*, 128 Wn. App. at 832. This offers “reasonable assurance that excessive charges for utility services will not be imposed.” *Snohomish County Public Util. Dist. No. 1 v. Broadview Cable Television Co.*, 91 Wn.2d 3, 9, 586 P.2d 851 (1978).¹³ Put another way, as the representative of the District’s ratepayers, its Board of Commissioners functions as the regulatory body for the PUD. *See* RCW 54.04.045(1)(c) (defining public utility district as a “locally regulated utility”). And, although the Companies could have challenged the Commissioners’ decision-making at trial, they never called them as witnesses, despite having deposed them and issued trial subpoenas for their attendance.

¹³ While the legislature has, since *Broadview*, enacted additional parameters to the PUD statute for pole attachment rates, it has not otherwise disturbed *Broadview*. Thus, under *Broadview*, the political accountability of the PUD Board of Commissioners remains the primary check on pole attachment rates.

Accordingly, the trial court's consideration of the arbitrary and capricious standard was not error.

2. Even if the trial court erred in considering the arbitrary and capricious standard, that error was harmless, and this Court should also affirm on other grounds.

The trial court's decision in the District's favor was correct, irrespective of the arbitrary and capricious standard. The following Conclusions of Law the trial court entered upholding the District's rates and other terms and conditions do not even mention the arbitrary and capricious standard: COL 10, 12, 13, 21, 35, and 36; *see also* COL 17-20.¹⁴ Even if the trial court's consideration of the arbitrary and capricious standard were found to be improper (which it should not be), the trial court did not reference that standard in reaching these Conclusions of Law underlying its decision, and any error was harmless. *See Carlstrom v. State*, 103 Wn.2d 391, 400, 694 P.2d 1 (1985) ("Although the trial court erred when it applied an arbitrary and capricious substantive due process test . . . , the error was harmless . . ."). In addition, this Court can appropriately sustain the trial court's decision based on the Conclusions of Law that do not reference the arbitrary and capricious standard, since the record supports them. *Dave Johnson Ins.*, 167 Wn. App. at 773 (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883

¹⁴ Other Conclusions of Law the trial court entered that reference the arbitrary and capricious standard do so in addition to the "just and reasonable" standard in RCW 54.04.045. *See, e.g.*, COL 11 and COL 30.

P.2d 1383 (1994)). Thus, regardless of the arbitrary and capricious standard, the trial court's decision should be affirmed.

C. **The Trial Court's Decision Upholding the District's Rates Should be Affirmed.**¹⁵

1. **The foundational flaw in the Companies' rate argument.**

The Companies' analysis of the District's rates rests on a foundational flaw – that the FCC Cable formula is the linchpin for PUD pole attachment rates, both before and after the 2008 amendments,¹⁶ and that FCC and WUTC statutes and related authorities govern the District's rate-making. The Companies concede, as they must, that the District is not subject to FCC or WUTC pole attachment rate-setting standards. Nevertheless, the Companies proceed through a complicated three-step analysis involving FCC and WUTC formulas, as well as FCC orders and

¹⁵ The Companies do not challenge on appeal the trial court's decision that the District's rates were just and reasonable before the effective date of the 2008 amendments to RCW 54.04.045. RAP 10.3(g).

¹⁶ One of the Companies' rate experts, Mark Simonson, admitted that the FCC Cable formula was developed to protect the cable TV industry as a fledgling industry, and that, as a result, the FCC Cable formula might well be obsolete except for small "mom and pop" cable TV operations—unlike the Companies. RP 1237:2-24. The Companies' principal rate expert, Patricia Kravtin, agreed the cable TV industry was no longer a fledgling industry, but disagreed with her co-expert that the FCC Cable formula might well be obsolete except for "mom and pop" cable TV operations. RP 1475:9-16. Ms. Kravtin's disagreement was predictable, since she has been a consistent supporter of the FCC Cable rate and has predominantly performed work for cable companies. RP 1384:24-1385:22, 1387:8-11. It was for the trial court to consider witness credibility, and it did not accept Ms. Kravtin's testimony. FOF 34-35; Memorandum Decision, ¶13. Furthermore, using the FCC Cable formula to support a fledgling cable television industry is contrary to the intent section of the 2008 amendments stating that the legislature recognized "the value of the infrastructure of locally regulated utilities" and wanted to "ensure that locally regulated utility customers do not subsidize licensees." Ex. 42. There is no evidence that cable companies in Pacific County need a subsidy. RP 1476:8-12.

related federal court decisions involving FCC methodologies, which are inapplicable to the District.¹⁷

Unlike the Companies' analysis, which the trial court rejected, the District's analysis is firmly based in the statutory language, the legislative history, and other confirming evidence, and is easily understood. The Companies' reading of Sections 3(a) and 3(b) is incorrect, and their mantra that their analysis is "straightforward," "irrefutable," "undisputed," "simple," and "beyond cavil," cannot change this.

2. Section 3(a) is not the FCC Cable formula.

Section 3(a) includes unusable space – support and clearance space. Exs. 42 (Appendix A), 193, p. 1 (*see* Appendix E), and 43A, p. 1 (*see* Appendix F);¹⁸ RP 164:13-165:7, 166:3-167:16, 170:1-21, 540:3-8, 542:5-544:9.¹⁹ The FCC Cable formula excludes unusable space. *Id.* One of the Companies' own witnesses (its Regional Manager of Engineering dealing with pole attachments) conceded this very point in a June 2007 email and in December 2009 sworn deposition testimony. Ex. 77; RP 1565:18-1566:6; CP 481 (p. 77:3-23).²⁰

¹⁷ The Companies went through this same analysis in their Joint Motion for Partial Summary Judgment, which the trial court denied.

¹⁸ Exhibit 43A (Appendix F) is a demonstrative exhibit the trial court permitted to be used in connection with the testimony of the District's General Manager regarding Sections 3(a) and 3(b). RP 174:22-175:3.

¹⁹ This is consistent with the legislative history. *See* Final Bill Report, p. 2 (first paragraph, second sentence) ("This [first] part of the formula must also include a share of the required support and clearance space") (*see* Appendix G).

²⁰ At trial, this witness tried to explain that he had since decided he was wrong when he sent an email saying exactly this in June 2007, and again was wrong when he testified the exact same thing under oath in December of 2009. RP 1566:1-2. He did not, however, testify about what caused him to change his view at trial, and witness credibility is the

Like Section 3(a), the FCC Telecom formula includes unusable space. Exs. 42, 77, 193, p. 1, and 43A, p. 1; RP 167:4-16, 543:20-544:9. Thus, unusable space can be depicted as follows with respect to the pole attachment rate formulas:

	<u>Unusable Space</u>
Section 3(a)	<u>Includes</u>
FCC Telecom	<u>Includes</u>
FCC Cable	<u>Excludes</u>

Section 3(a), therefore, cannot be the FCC Cable formula, because they differ in this fundamental respect.

In addition to this language in Section 3(a) itself, the language of Section 4 of the 2008 amendments confirms that Section 3(a) cannot be the FCC Cable formula. Section 4 includes the option of selecting either the FCC Cable rate or the rate under Section 3(a). Exs. 42, 193, p. 3, and 43A, p. 4; RP 168:13-15, 169:15-170:1, 170:21-171:1, 544:10-545:7. The language of Section 4 is clear:

(4) For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section **or** it may establish a rate according to the cable formula set forth by the federal communications commission

Exs. 42 (Appendix A) (emphasis added), 193, p. 3 (Appendix E), and 43A, p. 4 (Appendix F).²¹

province of the trier of fact, here the Court. *See* FOF 50. The Companies' principal rate expert disagreed with her client's own witness and even criticized the FCC itself for its "misunderstanding" of this point. RP 1437:9-1439:10, 1441:5-22.

²¹ The legislative history of the 2008 amendments to RCW 54.04.045 is consistent with this "option". Final Bill Report, p. 2 (fourth paragraph) (using the terminology "in lieu of the calculation in Part 1 of the two-part formula") (Appendix G) (emphasis added);

Section 4 establishes an alternative choice, an option – 3(a) or the FCC Cable formula. If the legislature had meant that Section 3(a) was the FCC Cable formula, it could easily have said: “Section 3(a) is the FCC Cable formula as it may be amended from time to time.” The legislature did not do that here, and it is not for courts to read words into statutes. *State v. Chapman*, 140 Wn.2d 436, 442, 773 (2010) 998 P.2d 282 (2000).

Consequently, Section 3(a) cannot be the FCC Cable formula. The language of Section 3(a) is different from the FCC Cable formula with respect to unusable space, and the language of Section 4, being an alternative to the FCC Cable formula, also shows they were not intended to be the same.²²

3. Section 3(b) is not the FCC Telecom formula.

Whether or not Sections 3(a) and 3(b) are “models of clarity”, one thing is absolutely clear: Section 3(b) divides 100% of the support and clearance space equally among the District and all attaching licensees. Exs. 42 (Appendix A), 193, p. 2 (Appendix E), and 43A, p. 2 (Appendix F); RP 173:18-174:2, 175:4-177:7, 546:24-548:7.²³ The FCC Telecom formula does not do that. It divides only 2/3 of the support and clearance

accord, House Bill Digest as Enacted (third paragraph (allowing rate calculated under 3(a) “or ... according to the cable formula”) (*see* Appendix H) (emphasis added).

²² The reference to the WUTC in the Senate Bill Report does not overcome the statutory language, legislative history, and other confirming evidence demonstrating that Section 3(a) is not the FCC Cable formula.

²³ This is consistent with the legislative history. Final Bill Report, p. 2 (second paragraph) (“divided equally among the PUD and all attaching licensees”) (Appendix G).

space among those parties. *Id.*²⁴ The APPA formula, like Section 3(b), divides 100% of the support and clearance space among the District and the attachers. *Id.* This is depicted as follows:

	Support and Clearance Space
Section 3(b)	100% divided equally
APPA	100% divided equally
FCC Telecom	2/3 divided equally

Section 3(b), therefore, is not the FCC Telecom formula. The Companies’ rejoinder that this 33 1/3 % is just a “minor difference” requiring just a “minor modification” does not change the reality that Section 3(b) is fundamentally different from the FCC Telecom formula.

The legislative history of the 2008 amendments is consistent with the trial court’s conclusion that Section 3(b) is the APPA formula, contrary to the Companies’ assertion that neither Section 3(a) nor Section 3(b) is the APPA formula. The comments on the floor of the legislature of Rep. John McCoy, the sponsor of the 2008 amendments to RCW 54.04.045, were admitted into evidence, and they expressly reference the APPA formula. Ex. 194 (DVD); Ex. 195 (CD); RP 465:11-466:11; FOF 51. With respect to how Sections 3(a) and 3(b) were structured, Rep. McCoy specifically referenced the APPA formula: “[W]e had taken a little bit of the FCC formula, a little bit of the APPA” RP 465:21-466:11; Exs. 194 and 195; *see also* Ex. 196 (excerpt from Rep. McCoy’s

²⁴ The Companies concede this critical difference. Comcast/Charter Brief, p. 35; Ex. 108 (CenturyTel employee) (first page, fifth paragraph, second sentence).

comments – *see* Appendix I).²⁵ The Senate Bill Report on the 2008 amendments also references the “American Public Power Association.” Ex. 81, p. 2 (third paragraph) (*see* Appendix J); FOF 51. Accordingly, the provision dividing 100% of the support and clearance space equally among the District and attachers, as well as the legislative history, show that Section 3(b) is the APPA formula, not the FCC Telecom formula. The trial court did not error in reaching that conclusion.

4. The District’s adopted rate is significantly below what is legally permitted.

RCW 54.04.045(3)(a) is, therefore, the FCC Telecom formula, and (3)(b) is the APPA formula. Exs. 42 and 193; RP 175:4-176:16; 546:19-23, 547:21-548:7. Using updated District data, the rate calculated under RCW 54.04.045 is **\$27.33**. Ex. 192; RP 179:5-19, 180:23-181:14, 548:8-550:23. The PUD Commission-adopted rate is **\$19.70**. FOF 10; Ex. 27; RP 106:11-13, 139:16-141:2, 550:24-551:2. The District’s rate is, therefore, 28% lower than the permissible rate under RCW 54.04.045. *Id.*; Exs. 192 and 201(*see* Appendix K).

²⁵ Contrary to the Companies’ claim that the 2/3 “slight modification” was what Rep. McCoy was referring to with respect to the APPA, he did not say “we took a whole bunch of the FCC and a little bit of the APPA.” He had the same wording on each one – “a little bit” of each. RP 465:21-466:11. And a difference of 33 1/3 % can by no means be characterized as “slight”.

5. The Findings of Fact regarding rates to which the Companies assign error are supported by substantial evidence.

There is substantial evidence in the record supporting the trial court's Findings of Fact (Appendix C-1) the Companies challenge regarding the District's rates. That evidence includes the testimony of witnesses (both District and Company witnesses), as well as numerous exhibits. See the immediately following footnote 26, which is a listing of the challenged Findings of Fact with respect to rates, with references to the evidence at trial supporting them.²⁶ The Findings of Fact on rates challenged by the Companies are supported by substantial evidence. The trial court's Conclusions of Law on rates are supported by its Findings of Fact. There was no error in this regard.

6. The Companies' rate "critique" does not warrant reversal.

The District adopted a new pole attachment rate of \$19.70, phasing it in over time, with the first year at \$13.25. FOF 10; Ex. 27. This was

²⁶ **FOF 5** (FOF 1-2; RP 86:5-87:10, 89:9-16, 1652:22-1653:9, 1653:15-19; RCW 54.08.010); **FOF 6 and FOF 7** (RP 89:2-90:3, 90:18-91:15, 92:19-93:12, 94:8-14, 94:21-95:7; Exs. 1-4); **FOF 33** (Exs. 6, 27, 201; RP 106:1-7, 180:23-181:14, 519:25-522:7, 568:13-572:24; FOF 10); **FOF 34 and FOF 35** (RP 1271:14-1272:10, 1390:14-18, 1391:22-1392:4, 1405:19-1406:7, 1406:25-1407:2, 1422:18-23, 1426:16-21, 1428:9-1429:14, 1430:2-5, 1442:15-18, 1444:10-1446:7; see also RP 561:2-562:23); **FOF 36** (RP 97:13-17, 98:19-22, 1485:16-1486:1; FOF 12); **FOF 37** (RP 177:10-178:4, 179:25-180:5, 534:24-537:1, 551:16-552:1, 1652:22-1653:9, 1653:15-19); **FOF 38** (RP 178:5-179:1, 534:9-23, 1444:1-1445:20, 1656:25-1657:25; Ex. 523); **FOF 39** (RP 303:12-304:3, 1126:23-1127:19, 1128:16-25, 1130:16-1131:6, 1659:23-1660:7; Exs. 208-210; see also CenturyTel Brief at 31n.17); **FOF 40** (RP 1660:8-14); **FOF 41** (RP 304:21-305:20, 311:2-6, 415:5-9, 1127:17-19, 1133:7-1134:8; Exs. 208 and 211); **FOF 47** (RP 340:5-11, 1392:23-1393:1, 1661:23-1662:1); **FOF 48** (RP 1430:19-23, 1431:25-1432:6, 1477:19-1478:3, 1661:5-1662:1; FOF 45 and 46); **FOF 49** (RP 1237:2-24, 1411:10-13, 1475:9-11); **FOF 50** (Ex. 77; RP 1565:18-1566:6; CP 481 (p. 77:3-23)).

based on an analysis by an experienced outside consulting firm²⁷ familiar with the District's operations and rate structure (RP 101:16-102:3, 474:22-475:8, 480:2-7; FOF 11), and was updated (including updated survey information) and re-analyzed by District management after the 2008 amendments to RCW 54.04.045. RP 164:13-180:22, 181:15-183:2; 534:24-537:1; 551:3-552:13, 1652:22-1653:19; Ex. 43 (Appendix B).²⁸ The rate the District adopted was below what its consultant recommended, below several alternative rates methodologies, and below what was permissible under RCW 54.04.045. Exs. 6 and 201 (Appendix K); RP 106:1-7, 519:25-522:7, 568:13-572:24.²⁹ As discussed in Sections V-C-1 through V-C-6 above, the trial court did not error in concluding that the District's rates do not violate RCW 54.04.045.

As they did in their Joint Motion for Partial Summary Judgment, their trial brief, and at trial, the Companies try to chip away at the

²⁷ See Exs. 185-186 for the District's rate consultant's curriculum vitae and other background information.

²⁸ It is not correct, as the Companies argue, that the District employed an after-the-fact "rationale" to justify its January 2007 rate decision in Resolution No. 1256. Nor is CenturyTel's innuendo that the District's General Manager made his rate recommendation to the Commission because he was angry about a back-billing issue with CenturyTel. RP 1660:15-22.

²⁹ CenturyTel argues that the District's adopted rate was higher than the average charged by other utilities, but that average included a private company, Qwest, which was subject to federal and state pole attachment rate restrictions not governing the District. Ex. 16, p. 000034. And, like the District, many public utilities had not changed their rates for many years. Ex. 6, p.7. Furthermore, if the District had not updated rates and developed a new agreement, the rates for attachments would have been between \$35 and \$42 -- much higher than those established in Resolution No. 1256. RP 136:17-25, 139:6-20; Ex. 26, p. 004743, 004803-4804; see also Deposition of Kathleen Moisan (1/5/10), pp. 67:16-68:24, 102:9-14.

District's analysis of Sections 3(a) and 3(b), which the trial court accepted, but their arguments do not hold up, let alone require reversal.³⁰

The Companies argue that the legislature intends the same meaning when it uses the same words in a statute, citing *Simpson Investment Co. v. Dept. of Revenue*, 141 Wn.2d 139, 3 P.3d 741 (2000). In *Simpson*, however, the Court concluded the legislature intended different meanings by using different words. *Simpson*, 141 Wn.2d at 160. And the Companies concede "the statutes use different words." CenturyTel Brief, p. 19. The Companies' rate expert admitted the same thing. RP 1425:25-1426:7.

The Companies repeatedly argue FCC law and WUTC law, neither of which governs the District. They assert that, because RCW 54.04.045 is "based on a federal statute," it must be interpreted in the same manner. But, even where two statutes may have "similarities," the construction of the federal statute is not controlling absent evidence that "Washington's statute was in fact 'adopted' from the federal provisions." *Washington Fed'n of State Employees v. State Personnel Bd.*, 54 Wn. App. 305, 311-12, 773 P.2d 421 (Div. II 1989).

³⁰ Among other things, the Companies claim the trial court did no analysis in reaching its conclusions regarding the District's rates, but they offer no support for that contention, other than the fact that the trial court disagreed with them. The parties briefed this issue on the Companies' Joint Motion for Partial Summary Judgment, which the trial court denied. The Companies put forth the same analysis in their trial briefs, opening statements, direct and cross examination, and closing arguments, during seven days of trial. They argued the same points again in their opposition to the District's proposed Findings of Fact and Conclusions of Law. The trial court rejected the Companies' position on Sections 3(a) and 3(b) in its Memorandum Decision (¶¶4-6), and again in its Findings of Fact and Conclusions of Law, providing specific reasons for doing so. See, e.g., FOF 33-46, 49-51; COL 3-30.

Nor do the other cases cited by the Companies support their assertions. Those cases state that, when the legislature adopts language that has previously been *judicially* construed, the language presumptively carries that judicial construction. But there is no prior judicial interpretation of Sections 3(a) and 3(b).³¹

The Companies argue that the evidence is “wholly undisputed” that RCW 80.54.040 has been uniformly interpreted as imposing the FCC Cable formula. That, however, is irrelevant to the District, which is not regulated by either the WUTC or the FCC with respect to pole attachment rates.³² Furthermore, the testimony on this subject was by the Companies’ rate expert Mark Simonson, who admitted that his testimony was limited to investor-owned utilities, was based on non-current information, and relied on a 20-year old voluntary settlement agreement among investor-owned utilities to which neither the District nor any other consumer-owned utility was a party. RP 1228:9-12232:8; *see also* RP 562:24-563:15, 564:5-7.³³

³¹ *FCC v. Florida Power*, 480 U.S. 245, 107 S. Ct. 1107 (1987), cited by Comcast and Charter to support their argument in favor of the FCC Cable formula, concerned an FCC order under federal law that does not govern the District. Furthermore, the challenge to the FCC order was based on constitutional principles of taking of property, which is not at issue here.

³² The Companies argue that the APPA formula is not used by any agency that regulates pole attachments. But that is because consumer-owned utilities like the District are generally not regulated by federal or state pole attachment rate regulators and, instead, are regulated by their own publicly-elected officials.

³³ Although the District’s rate expert stated that the wording of Section 3(a) and RCW 80.54.040 was similar, he did not testify that the differences between the two statutes are “minor and editorial” as the Companies argue. Furthermore, the Companies’ argument that the District’s rate expert agreed that the FCC Cable formula is generally considered the test of a just and reasonable rate, is incorrectly taken out of context. That statement in the 2005 EES rate study was in the historical context, not linked to consumer-owned

Similarly, the Companies struggle to support their Section 3(b) argument by referencing an April 2011 FCC order to which the District, again, is not subject. Furthermore, the 2011 FCC order was after the amendments to RCW 54.04.045 became effective in 2008, and after the trial court's March 2011 Memorandum Decision in the District's favor.

The Companies rely on the testimony of their principal rate expert, Patricia Kravtin, to justify their interpretation of Sections 3(a) and 3(b). The trial court, however, heard Ms. Kravtin's testimony and concluded that the pole attachment rate she derived is unreasonable and impractical as it relates to this case, that her opinions were based primarily on theoretical analysis of economics and public policy rather than actual local information regarding the District, and that her opinion on the PUD's maximum rate was lower than what the Companies had been voluntarily paying for over 20 years. FOF 34-36; Memorandum Decision, ¶13. Credibility is for the trier of fact – here, the trial court – to determine. *Dave Johnson Ins.*, 167 Wn. App. at 778-79; *Org. to Preserve Agricul. Lands*, 128 Wn.2d at 882. Furthermore, speculative expert opinions lacking an adequate foundation are improper. *Queen City Farms, Inc., v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994).

utilities, and directly contrary to the analysis and recommendations EES actually made in its report. Ex. 6, pp. 22-23; RP 106:1-7, 519:25-520:19. Moreover, EES acknowledged what there is no disagreement about—that consumer-owned utilities like the District are not subject to FCC or WUTC regulation. RP 732:20-22, 733:4-12.

Ms. Kravtin's testimony on cross-examination supported the District's position and is contrary in numerous respects to the Companies' criticisms of various Findings of Fact and Conclusions of Law entered. For example, Ms. Kravtin admitted there is no regulation by the FCC or the WUTC for locally owned utilities like the District. RP 1388:2-14, 1389:4-6, 1459:1-11, 1460:24-1461:5. She admitted that Sections 3(a) and 3(b) contain no specific mathematical formula. RP 1422:25-1423:4. She admitted the language in Section 3(a) is not identical to either RCW 84.04.050 (the WUTC statute) or to the FCC Cable formula. RP 1425:25-1426:7. She admitted cable television is no longer a fledgling industry. RP 1411:10-13, 1475:9-11. She admitted that Section 3(b) and the APPA formula allocate unusable space equally among all attachers, while the FCC Telecom formula allocates only 2/3 of that space among attachers, and that the 2/3 factor in the FCC Telecom formula is not used in Section 3(b). RP 1423:19-1424:16. She admitted she had not seen the legislative history (Rep. McCoy's comments or the Senate Bill Report) on the 2008 legislation before she formed her opinions. RP 1424:17-1425:15, 1430:6-14. She admitted that gross versus net costs are not specified in either the FCC or WUTC statutes. RP 1414:24-1415:10.³⁴

Ms. Kravtin also testified there was nothing wrong with the District using a rate of return in its pole attachment calculations, even

³⁴ The District's General Manager testified that Sections 3(a) and 3(b) do not specify net versus gross costs either. RP 280:13-281:2. RP 1533:20-23.

though it is a not-for-profit entity. RP 1419:23-1421:4.³⁵ She admitted that her opinion regarding the appropriateness of including transmission poles as an input in calculations of the District's rates under Sections 3(a) and 3(b) might change if she had known about the evidence (RP 178:5-179:1, 1656:25-1657:25; Ex. 523) that at least 65% of the District's transmission poles had third party attachments on them. RP 1444:1-1445:20; *see also* RP 534:9-23.

Ms. Kravtin admitted that "reasonable" in the just and reasonable standard in RCW 54.04.045 means not arbitrary or capricious; it means something for which a reason can be given. RP 1466:7-13. She admitted that pole attachment rates are a very small component of the Companies' total expenses (RP 1430:19-23; FOF 46), and that there would be no material disadvantage to the Companies' business in Pacific County if they had to pay at the District's adopted rate. RP 1431:25-1432:6. She admitted that the Companies receive benefits from having their equipment on PUD poles, because the expense of building their own poles would exceed what they have to pay in pole attachment fees. RP 1477:19-1478:3; FOF 45. And she admitted that the rates the Companies had been paying voluntarily for 20 years were higher than the rate she derived

³⁵ Ms. Kravtin admitted the rate of return EES used in its rate calculations (6%) was much lower than the FCC default rate of return (11.25%), that a lower rate of return would move rates down rather than up, and that the rate of return she used in her calculations was very similar to the EES rate of return. RP 1421:5-22. She also admitted the carrying charge she used was very similar to what EES used. RP 1421:23-1422:2.

through her theoretical analysis based on the FCC Cable formula. RP 1485:16-1486:1.

Ms. Kravtin was also questioned (RP 1459-82) based on a number of the Conclusions of Law entered by Hon. Kathleen Learned in *TCI Cablevision of Washington, Inc.*,³⁶ v. *City of Seattle*, King County Superior Court No. 97-202395-5 SEA (1998), CP 1008-1034, which was decided under a pole attachment statute applicable to cities (RCW 35.21.455) that is virtually identical to RCW 54.04.045 prior to the 2008 amendments. *See, particularly, TCI v. Seattle* Conclusions of Law 1, 6, 7, 11, 13, 14, 16, 22, 23, 29, 43, 47, 49, 50, 51, 53-55, and 56. CP 1025-1032. Many of these Conclusions of Law are directly contrary to the underpinnings of many of the Companies' arguments and the opinions of their expert witnesses in this lawsuit.³⁷

The Companies argue that Pacific County's road standards require power and telecommunication utilities to share common trenches or poles. That provision, however, uses the word "should", not "shall", and is

³⁶ TCI Cablevision was the predecessor of Appellant Comcast. RP 1533:20-23; Ex. 68.

³⁷ CenturyTel argues that FOF 33, 35, and 49 are Conclusions of Law, not Findings of Fact. Those, however, are comparisons of the District-adopted rates with those recommended by its rate consultant, the trial court's observations of the Companies' principal rate expert and her lack of familiarity with Pacific County, and the fact that the FCC Cable formula was developed to support a fledgling cable television industry, which is no longer a fledgling industry. These were appropriate Findings of Fact, and were supported by substantial evidence in the record. *See* Section V-C-5 above. Even if they were Conclusions of Law, they were not error. CenturyTel's assertion that several Findings of Fact are "plainly and erroneously incomplete" as to retail versus wholesale service is also without basis. Even Patricia Kravtin admitted the District does not serve retail communications customers (RP 1392:23-1393:1); *see also* District General Manager Miller's testimony. RP 340:5-11. Furthermore, whether or not CenturyTel provides wholesale services in Pacific County is not germane to the issues on appeal.

modified by the phrase “to the maximum extent possible.” CP 2134.

Thus, it is not mandatory.³⁸ Indeed, CenturyTel has installed its own poles next to District poles and transferred its attachments to its own poles. *See* discussion at footnote 64, below. Most importantly, those standards do not say that communications companies are permitted to attach to and remain on electric utility poles without paying current rates and without signing pole attachment agreements.

CenturyTel argues that the word “sufficient” in RCW 54.04.045 actually means “no more than sufficient”, but offers no support for adding those words. Courts cannot read into a statute anything they may conceive the legislature unintentionally left out. *Fed. Way School Dist. v. Vinson*, 172 Wn.2d 756, 767 n.10, 261 P.3d 145 (2011). Furthermore, the word “sufficient” is not even referenced in Section 3(a) or 3(b), which only establishes the framework for “just and reasonable” pole attachment rates. In any event, the reason the word “sufficient” is in this type of rate-setting statute is to ensure that municipal utility bondholders have adequate security supporting standard rate covenants in municipal bond issues. *See, e.g.*, RCW 54.24.050(4); RCW 54.24.080.

The Companies also argue that Section 3(a) does not mention a two-thirds figure as the FCC Telecom formula does, but the phrase

³⁸ CenturyTel concedes this. CenturyTel Brief, p. 47 (“... may not be able to rebuild ...”) (emphasis added).

“including a share of the required support and clearance space” in Section 3(a) (emphasis added) reflects that fraction. RP 272:7-273:6.³⁹

CenturyTel criticizes the District’s rates because equipment other than the Companies’ is sometimes in the safety space. But CenturyTel admits its own equipment has been in the safety space from time to time (CenturyTel Brief, p. 31 n.17). The evidence at trial confirmed that the Companies have their equipment in the safety space. RP 303:12-304:3, 1126:23-1127:19, 1128:16-25, 1130:16-1131:6, 1644:19-1645:13; Exs. 208-210. Furthermore, CenturyTel is incorrect that there was no evidence supporting FOF 41 that the District’s use of safety space on its poles for light fixtures was not an adopted practice, but rather was a phasing out of that use. RP 304:21-305:20, 415:5-9, 1127:17-19, 1133:17-1134:8; Exs. 208 and 211. In any event, there are so few instances that it would not affect the formula if included. RP 311:2-6.⁴⁰

The Companies also criticize the potential recovery of “make-ready” charges when modifications must be made to accommodate new

³⁹ The Companies also argue that the specific words “pole height” and “attaching licensees” do not appear in the text of Section 3(a), but, as the District’s General Manager testified, although those “exact words” may not be in the text, there are words that lead to the same point. RP 270:20-271:15. Section 3(a) uses the words “a share of the required support and clearance space, in proportion to the space used for the pole attachment”, and the mathematical equivalent of those words in the FCC Telecom formula includes number of attaching entities and pole height. *See* Ex. 43A, p.1 [first bracket].

⁴⁰ Further with respect to the safety space, as the Companies acknowledge, the APPA formula includes the safety space in support and clearance space. But the conclusion the Companies’ draw-- that that shows that Section 3(b) cannot be the APPA formula-- wholly ignores why Section 3(b) cannot be the FCC Telecom formula (as the Companies contend) – based firmly on the statutory language (100% versus 2/3 of the support and clearance space) and the legislative history. *See* discussion in Section V-C-3, above.

attachers.⁴¹ But there is nothing in Sections 3(a) or (b) that precludes make-ready charges. And there was no evidence that the District ever charged for make-ready. RP 1413:6-9.⁴²

None of the Companies' rate "critiques" requires reversal of the trial court decision, whether or not the arbitrary and capricious standard applies.

D. The Trial Court's Decision in the District's Favor With Respect to the Proposed Agreement Should Be Affirmed.

1. Fundamental considerations and standards.

The Companies' communications equipment is on the District's electric poles under licensing agreements, in order for the Companies to be able to make money from their customers. It would cost the Companies much more to purchase, install, maintain, and repair their own poles. The Companies claim the whole agreement under which they would continue to attach their equipment to the District's poles is void because it is unjust, unreasonable, and procedurally and substantively unconscionable. After a

⁴¹ CenturyTel itself charges for make-ready work. Dep. of Kathleen Moisan (1/6/10), p. 228:11-13.

⁴² CenturyTel challenges FOF 37 regarding the District's survey of pole attachments, without specifying why. If this is because transmission poles were included, *see* Kravtin testimony discussed above. RP 1444:1-1445:20; Ex. 523. In any event, a trial court has discretion to consider survey evidence, and any claimed problems with survey methodology go to the weight of the evidence, not admissibility. *Simon v. Riblet Tramway Co.*, 8 Wn. App 289, 294, 505 P.2d 1291 (Div. III 1973), *rev. denied*, 82 Wn.2d 1004 (1973). CenturyTel also briefly mentions pole life, but the evidence showed that estimated pole life varies due to climate, insect activity, moisture, and other circumstances. FOF 42; RP 1658:2-1659:4. Furthermore, the quality of cedar used in utility poles has decreased over time, and there are more restrictions on permissible preservatives than in the past. FOF 43; RP 402:11-403:15. Thus, although the District designs its overall system for an estimated forty-year life, actual pole life is much shorter. In addition, the Washington State Auditor has never criticized the District's accounting treatment for pole attachments. FOF 52.

great deal of testimony and documentary evidence, the trial court disagreed.

The non-rate terms and conditions in the District's proposed pole attachment agreement (Ex. 38 - - *see* Appendix L) must be just, reasonable, non-discriminatory, and sufficient. RCW 54.04.045. Consideration of the arbitrary and capricious standard in this regard was appropriate. The District is governed by a locally-elected Board of Commissioners. Like other consumer-owned utility decision-making, the Commissioners' decisions are entitled to a high degree of discretion. *See* discussion in Section V-B-1, above.⁴³ But, whether or not the arbitrary and capricious standard is considered, the District's proposed agreement meets the requirements of RCW 54.04.045.

2. The process of developing the new agreement.

The District decided it made sense to have a uniform template for its pole attachment agreements. RP 99:11-21; FOF 18. This was based not only on anticipated lessening of administrative burden for a small utility, but also to ensure that the agreements were "non-discriminatory," as required by RCW 54.04.045 both before and after the 2008

⁴³ A decision is arbitrary and capricious only if it is willful and unreasoning, taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003); *Friends of Columbia Gorge, Inc. v. Forest Practices Appeals Bd.*, 129 Wn. App. 35, 57, 118 P.3d 354 (Div. II 2005) (quoting *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 769, 49 P.3d 867 (2002)). Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration. *Friends of Columbia Gorge, Inc.*, 129 Wn. App. at 57-58 (quoting *Isla Verde Int'l Holdings, Inc.*, 146 Wn.2d at 769 Courts are not to substitute their judgment for decisions of public entities. *State ex rel. Rosenberg v. Grand Coulee Dam Sch. Dist. No. 301 J*, 85 Wn.2d 556, 563, 536 P.2d 614 (1975).

amendments. RP 99:11-101:11, 953:23-954:13; FOF 18. The District started with a model agreement obtained from the American Public Power Association, a national public utility organization that had spent significant time developing a model agreement. RP 108:22-109:11; FOF 17. It then made modifications to the model agreement for the District. RP 109:12-110:18; FOF 17.

The Companies argued at trial, and continue to do so on appeal, that the District refused to negotiate with them and provided the agreement on a "take it or leave it" basis. They, however, cite no legal authority that requires a consumer-owned pole owner like the District to negotiate the terms and conditions of an agreement under which private for-profit companies attach to public property.⁴⁴ Even if the District had a duty to negotiate, it did so. The evidence clearly shows there were multiple iterations of the proposed agreement based on emails, conference calls, and in-person meetings between the District and the Companies over the course of eighteen months.⁴⁵ The District accepted many suggested

⁴⁴ Whether or not the FCC, as the Companies contend, has recognized that a party does not negotiate in good faith if it discontinues discussions on the terms and conditions of an agreement, the authority cited for that proposition is an FCC order that does not govern a consumer-owned utility like the District.

⁴⁵ Exs. 26, 33-39, 74, 76, 130-137, 156-175, 304-305, 307-316, 325, 505, 508-509, 943-944, 947-948; RP 143:24-155:5, 320:4-321:1, 853:25-855:1, 871:14-872:18, 890:17-891:24, 898:6-24, 954:24-955:6, 955:23-956:16, 957:1-12, 958:10-963:11, 963:20-967:22, 969:22-970:4, 1136:12-1153:11, 1541:15-1543:17, 1547:7-1552:16; Dep. of Kathleen Moisan (1/5-6/10), pp. 109:4-111:6, 136:13-138:14, 139:12-18, 139:22-140:25, 178:24-179:11, 194:18-195:22; FOF 16 and 19-20.

revisions proposed by the Companies and provided reasons for not accepting others.⁴⁶

Furthermore, “negotiate” means: “1. To communicate with another party for the purpose of reaching an understanding <they negotiated with their counterparts for weeks on end>. 2. To bring about by discussion or bargaining <she negotiated a software license agreement>” Black’s Law Dictionary at 1136 (9th ed. 2004); *see also* Webster’s Third New International Dictionary at 1514 (1981) (“To communicate or confer with another so as to arrive at the settlement of some matter . . .”). This is what occurred here. *See* citations to record in footnotes 45 and 46, above. The Companies’ own witnesses agreed. RP 1011:12-16. They testified there were negotiations with the District. RP 967:11-22, 1145:8-11; Moisan Dep. (1/5/10), p. 179:4-12.⁴⁷

The Companies also argue the District “unilaterally” terminated their agreements. They do not, however, contend the District was not entitled to terminate those agreements on required notice, which was given. FOF 8.⁴⁸ The record also belies the Companies’ assertion that the District did not engage in a section-by-section review of the proposed agreement. *See* citations to record in footnotes 45 and 46, above. And,

⁴⁶ RP 152:17-153:12, 890:20-23, 899:6-8, 1143:12-1144:3, 1153:25-1154:17, 1542:18-1543:17, 1547:7-1550:23; Exs. 36 and 38.

⁴⁷ They also testified that a contractual term can be reasonable whether or not arrived at through negotiation. RP 1011:8-11.

⁴⁸ CenturyTel had two agreements with the District, but agreed on a December 31, 2006 termination date for both. Exs. 114 and 116.

without citing any authority, the Companies suggest the District's Board of Commissioners was legally required to direct District management to engage in further discussions of proposed terms and conditions with the Companies, simply because the Companies, after 18 months of communications with District management on these very subjects, and not having attended public meetings and hearings,⁴⁹ demanded that the Commissioners do so.

The Companies also comment that the District's Chief of Engineering and Operations, Jason Dunsmoor, was not advised about their concerns about the proposed agreement, but he provided input to the General Manager. RP 398:25-399:22. Furthermore, the General Manager was the Chief of Engineering and Operations before Mr. Dunsmoor, so he had done the same job Mr. Dunsmoor did, and Mr. Dunsmoor, therefore, saw no need to consult with the General Manager on every concern. RP 440:21-24.⁵⁰

3. The most compelling evidence.

The record is replete with testimony and exhibits establishing that the provisions of the proposed pole attachment agreement (Ex. 38 – Appendix L) meet the just and reasonable standard, whether or not the

⁴⁹ The District provided all notice of public hearings and meetings on its proposed rates and agreement required under the Open Public Meetings Act. COL 32; CenturyTel Brief, p. 11; RP 973:1-13, 1552:2-4.

⁵⁰ The General Manager is a registered professional engineer in the State of Washington, is also a member of the Institute of Electrical and Electronic Engineers, and has worked as the District's Chief of Engineering and Operations Manager, as well as General Manager, for over 30 years. RP 80:17-83:22. The background and responsibilities of the District's Chief of Engineering and Operations Manager are at RP 350:20-352:16.

arbitrary and capricious test is considered. The most significant evidence is: 1) the testimony of the District's General Manager and Chief of Engineering and Operations; 2) the fact that another attaching entity signed the first version of the new agreement before any revisions at all; and 3) the fact that the Companies' own agreements contain the same provisions they challenge.

The District's General Manager and Chief of Engineering and Operations testified extensively about why various provisions are in the District's proposed agreement and why they are reasonable. RP 186:11-206:19, 358:14-398:24; Exs. 58-67. The testimony revolved around the fundamental responsibilities of the District to ensure safety, reliability, and stability and protection of public funds, including lowest cost possible. RP 90:5-17, 200:22-201:20, 358:14-359:6.⁵¹ The District's expert witness confirmed that the terms and conditions were just and reasonable. RP 576:20-578:6.

Also significant is the fact that another attaching entity signed the earlier version of the agreement the District proposed, even before any revisions. RP 159:13-23.

Particularly telling is CenturyTel's own agreements, where it is the pole owner - in the position of the District here. At trial, the District

⁵¹ The Companies assign error to **FOF 30 and 31** because, based on the evidence at trial, including live testimony, the trial court concluded there were "credible reasons" underlying the provisions in the agreement the Companies challenge. Credibility is entirely appropriate for the trier of fact to consider. The determination that there are reasons for the provisions in the proposed agreement (and that they are credible) meets both the just and reasonable standard of RCW 54.04.045 and the arbitrary and capricious standard.

introduced examples of these contracts that contain many of the very same provisions the Companies claim are unjust and unreasonable in the District's agreement. Exs. 139-140. These provisions are appropriately included to protect the financial and operational integrity of the owner's system, including safety and reliability concerns, regardless of whether it is the District or CenturyTel that is the pole owner.

In addition, dozens of other agreements all three Companies have entered into with other pole owners in the State of Washington were admitted in evidence that demonstrated that virtually all of the provisions about which the Companies complain are in pole attachment agreements the Companies themselves (or their assigning predecessors) executed, and under which they operate. Exs. 93-102, 139-140, 142-151, 176-179, and 182. The Companies' own pole attachment personnel testified to this effect, and also testified they had seen the challenged provisions in other pole attachment agreements. RP 977:17-1005:22, 1162:23-1164:17, 1166:1-1167:10, 1191:3-5, 1241:9-1244:3, 1246:6-1248:2, 1248:12-22, 1554:12-1555:12, 1556:8-1564:12, 1564:21-25; *see also* RP 1167:2-23, 1169:4-6; Moisan Deposition (1/6/10), pp. 214:18-224:13, 228:16-231:4, 231:21-232:18, 245:1-246:3; *see also* 233:7-235:15 . Excerpts from the Moisan Deposition were read into the record at trial. RP 752:2-759:4.⁵²

⁵² The Companies argue this Court should ignore the evidence that virtually all of the types of non-rate terms and conditions they challenge are in their own pole attachment agreements. But the cases they cite are inapposite, involving FCC interpretations of federal statutes from which the District is expressly exempted. The Companies provide no authority requiring this Court to adopt the double-standard that would prohibit the

Thus, these are not unusual or uncommon provisions. This evidence, plus the District's testimony, show that the provisions have "a basis in fact" and are not "absurd" or "ridiculous," as the Companies contend they, by definition, must be in order to be unjust and unreasonable. Where, as here, the trial court did not agree with the Companies' theories and there is substantial evidence in the record to support the trial court's findings, there is no error. *State v. Port of Walla Walla*, 81 Wn.2d 872, 875, 505 P.2d 796 (1973) (citing *Kuster v. Gould Nat'l Batteries*, 71 Wn.2d 474, 476, 429 P.2d 220 (1967)).

4. The provisions of the proposed agreement are not illegal.

The Companies discuss just a few specific provisions of the proposed agreement with which they take issue, but they assert this is "not an exhaustive list" and reference in general terms multiple additional objections in the record below. A few of the provisions the Companies challenge, but do not discuss in their briefs, are particularly telling as to their claims of unreasonableness. For example, the Companies object to any inspections of their equipment other than every five years. RP 198:13-199:19. They object to their being responsible for bringing hazardous materials onto public property unless they do so willfully. RP 202:11-21. They object to identification tagging of their equipment, despite important safety and other reasons. RP 366:13-370:18. They

District from referring to contract provisions the Companies themselves continue to employ.

object to a permit being required for “overlashing” attachments, despite impacts of overlashing on District facilities. RP 187:12-188:14, 362:22-364:6. And they object to provisions requiring them to remove their own non-functional attachments -- and there was evidence of their own equipment lying on the ground, or unattached, or hanging below legal limits. RP 370:19-372:21, 372:22-377:13, 377:14-379:1, 382:17-384:3, 384:4-390:223; Exs. 59-67. The specific objections raised in the Companies’ briefs are addressed immediately below.

Liability and indemnification limitations are in many of the Companies’ other pole attachment agreements. Furthermore, Section 4.4 is modified by the carve-out for the District’s own negligence in Section 16.1. This same basic provision is in the Companies’ pole attachment agreements with other consumer-owned utilities. *See, e.g.*, Exs. 93 (§§ 22 and 23) and 144 (§ 16.2). The Companies’ own witness agreed this is fair. RP 984:25-985:18.⁵³

The District’s General Manager explained how the provisions in the proposed agreement regarding “grandfathering” and National Electric Safety Code provisions worked together. RP 191:17-192:6, 194:23-195:16, 254:10-256:17. He and the District’s Chief of Engineering and

⁵³ Contractual limitations on liability, including much more stringent limitations on liability than are at issue here, are not unjust and unreasonable. *See, e.g., Ruston Gas Turbines, Inc. v. Pan Am World Airways*, 757 F.2d 29 (2nd Cir. 1985) (motor carrier’s tariff limiting liability for damage to cargo was just and reasonable); *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 428-30 (D.C. Cir. 1987) (limits on pipeline’s liability for gas curtailments are just and reasonable); *Howe v. Allied Van Lines, Inc.*, 622 F.2d 1147 (3rd Cir. 1980) (60 cents per pound limitation on motor carrier’s liability was proper under just and reasonable standard), *cert. denied*, 499 U.S. 992, 101 S. Ct. 328 (1980).

Operations also explained the professional engineer provisions and why a waiver option makes sense so the agreement would be uniform for all attachers. RP 195:21-196:20,⁵⁴ 362:9-21, 459:18-460:18. The record also established that revisions to the professional engineer provision in the proposed agreement were proposed by the Companies, and accepted by the District. RP 196:4-9, 196:17-20; *see* Appendix G to Ex. 38.

The Companies offer no convincing basis for their argument that their employees who work around electric wires in the safety space (and the record shows that their equipment is at times in that area⁵⁵) should not have experience in working in those areas from a safety point of view. The District's Chief of Engineering and Operations testified to the contrary. RP 443:2-7. The Companies also offer no reason why post-construction inspections by both an attacher and the District are inappropriate from a safety and reliability point of view. And the testimony of the Chief of Engineering and Operations on which the Companies purport to rely only states it would be reasonable for the District to continue doing post-construction inspections; he was not asked whether that was to the exclusion of inspections by attaching entities. RP 441:24-442:9.⁵⁶

⁵⁴ Comcast's assertion that the General Manager testified a waiver could be granted or revoked arbitrarily is not supported by the record. RP 195:21-196:16.

⁵⁵ RP 303:12-304:3, 1126:23-1127:19, 1128:16-25, 1130:16-1131:6, 1644:19-1645:13; Exs. 208-210.

⁵⁶ Indeed, the Companies argue that inspections by the District should be permitted only once every five years. RP 198:13-22. That would not be reasonable from the point of view of safety and other considerations. RP 198:23-199:19, 364:7-366:12.

The Companies also claim that requiring them to bear their costs resulting from undergrounding of District facilities (§ 10.3) is unreasonable and contrary to a WUTC tariff requiring the “customer” to bear the cost of “customer requests” for “relocation or rearrangement of facilities.” But the District is not the “customer” on District poles, which is what this provision relates to. If the District gives the attacher the required 90-day notice and the attacher does not move its equipment and make arrangements to underground it with the District’s equipment, or otherwise, it is not unreasonable for the attacher to pay a failure to transfer fee.⁵⁷ Furthermore, the Companies’ argument assumes that the WUTC can enforce its tariff against the District, a result directly contrary to RCW 54.04.045(7), which prohibits the WUTC from exercising authority over the District in matters relating to pole attachments.⁵⁸ The Companies’ argument that the District’s customer-owners should not only bear the costs for undergrounding the District’s facilities, but also the cost of undergrounding the Companies’ facilities, unfairly compromises public funding. It is not unreasonable to require the Companies to bear their own

⁵⁷ Comcast and Charter did not object to this provision in correspondence with the District. Ex. 511.

⁵⁸ WUTC tariffs must be read consistent with statutes and cannot set terms that conflict with statute, as would the Companies’ reading of the agreement in this regard. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1169 (9th Cir. 2001).

undergrounding costs. This same basic provision is in other of the Companies' agreements. *See, e.g.*, Exs. 93 (§ 9) and 144 (§ 10.3).⁵⁹

The Companies also contend that the provision of the proposed agreement requiring, in the absence of District permission, a 4-foot minimum distance for attachers' equipment to be from the base of District poles (§ 2.12) is unreasonable and illegal. The reason for this requirement is safety. RP 188:18-189:18, 398:5-24. Furthermore, the Companies' right to use rights-of-way under Art. 12, § 19, is not unlimited. Art. 12, § 19 provides that the "legislature shall . . . provide reasonable regulations to give effect to this section." In this case, the legislature has, through RCW 54.04.045, provided public utility districts with the authority to regulate pole attachments, and the proposed agreement reflects reasonable regulation of the Companies' rights for safety reasons. In addition, Art. 12, § 19 relates only to railroad rights-of-way. And, CenturyTel's agreement with another public utility has the same provisions. Ex. 144 (§ 2.12).

The Companies also criticize the one-way attorneys' fee provision. But this kind of provision is not uncommon in commercial contracts. If applicable, RCW 4.84.330 makes them reciprocal. That does not make them illegal. This is discussed further in Section V-F-7, below.

⁵⁹ These agreements also contain the same basic provisions as the District's proposed agreement regarding costs of rearrangement and transfer of facilities. Exs. 93 (§ 9) and 144 (§ 9.4.1).

The Companies also criticize that the District, in order to demonstrate the fairness and reasonableness of its proposed agreement, offered to execute an agreement with them on the same basic terms and conditions of its proposed agreement, in situations where the District attaches on the Companies' poles. The District's willingness to do so supports, rather than undermines, the justness and reasonableness of the proposed agreement.⁶⁰

The Companies also claim that what they characterize as ambiguity regarding whether the District's attachment fees are on a per-pole or a per-attachment basis somehow renders the proposed agreement illegal. But, even if certain terms were ambiguous, that does not make them unjust or unreasonable. They merely require interpretation of the parties' intent. Intent is determined not only from the language of the agreement, but also from the circumstances surrounding the making of the contract and the conduct of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990).⁶¹ Thus, extrinsic evidence, including the correspondence and email exchanges between the parties making clear that the rates are to be charged on a per-pole, rather than a per-attachment, basis properly resolves the claimed ambiguity. (Ex. 36, p.1 (bottom – (1);

⁶⁰ The difference in attachment charges is something easily handled in billing. Moisan Dep. (1/5/10), p. 49:1-23; Ex. 103B; *accord*, Ex. 4, § XI(d), p. 7.

⁶¹ The Companies rely on a parol evidence case decided 40 years before *Berg v. Hudesman*.

Ex. 123; RP 347:13-22, 1551:5-18; Moisan Dep. (1/5/10), p. 65:3-22. There is no disagreement between the parties on this simple billing point.⁶²

Similarly, the fact that the pole attachment fees to be paid by the Companies do not appear within the text of the agreement itself does not make it illegal. Section 3.1 (Ex. 38) states that the Companies must pay the fees and charges specified in Appendix A to Ex. 38. “Appendix A – Fees and Charges” specifies the rates of \$13.25 effective January 1, 2007, and \$19.70 effective January 1, 2008. Ex. 38, pp. 9 and 37. Any necessary make-ready work is estimated and then billed at actual cost. Ex. 38, §§ 7.1 and 7.2. Other fees are also specified in the agreement. *See, e.g.*, §§ 8.2, 13.1, 14.1, and Appendix A (Ex. 38, p. 37).

The Companies also challenge the timeframes for removal of their equipment at the termination or expiration of the agreement. Those timeframes are not dissimilar to those found in other agreements under which the Companies operate. Furthermore, the actual timeframe for removal is far longer than the Companies claim. There is a period of eight months for removal once notice is given -- 180 days under Section 23.1, plus 60 days under Section 11. Ex. 38. A CenturyTel witness confirmed this. RP 1641:13-17.⁶³ This is 60 days longer than the six-month notice the Companies themselves requested. Ex. 36, p.15 (§ 23).

⁶² Furthermore, one of the other of the Companies’ agreements contains this same provision. Ex. 144.

⁶³ There are also additional notice periods that would add more time. RP 197:10-198:12.

Last, CenturyTel's argument that it is a provider of last resort and, therefore, cannot ever be required to remove its equipment from the District's poles, is also without merit. The provisions on which CenturyTel relies do not say what it would like them to say. Furthermore, those WUTC provisions do not govern the District, and they certainly do not say that a private company can remain on a public agency's poles forever, without paying at Commission-adopted rates and without a contract in place. RP 1011:17-1012:16, 1639:1-5. At most, those regulations say the private attacher must take steps to provide service to its customers. RP 1012:17-25.⁶⁴ This is not about 9-1-1 service. This is about money, and some contractual provisions the Companies would rather not have.

5. The proposed agreement is not unconscionable.

The Companies cite no authority that an unconscionable contract is necessarily unjust or unreasonable. Even if that were so, the proposed agreement is not unconscionable.

There was no procedural unconscionability here. The Companies had reasonable opportunity to understand the terms of the agreement; there was no inequality of bargaining power; the companies are sophisticated parties; there was no high-pressure salesmanship;⁶⁵ there were no terms

⁶⁴ CenturyTel has, in fact, sometimes installed its own poles next to District poles and transferred its attachments to its own poles. RP 460:19-461:12. Thus, the Companies make alternative arrangements when they want to.

⁶⁵ Among other things, District personnel always treated the Companies courteously. RP 968:21-969:22, 1146:15-18; Ex. 175; *see also* FOF 27.

hidden in “fine print.” *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, 814-15, 225 P.3d 213 (2009). This was an 18-month long process of exchanging drafts and revisions, including communications by email, telephone, and in person. The Companies knew January 1, 2007 would be an important date for new rate implementation. RP 972:2-973:7; Exs. 33-34. They knew Commission meetings were open to the public (RP 973:11-13, 1552:2-4), but they did not attend the public hearings and rate resolution public meeting (RP 133:4, 141:18-23), and they did not assign anyone to monitor Commission meeting activity regarding new rates and the new agreement. RP 973:14-974:19, 1141:25-1143:1, 1551:19-1552:16. *See* discussion in Section V-D-2, above.

The Companies’ procedural unconscionability argument rests on the fact that the District did not accede to all of their demands. But every discussion of terms of a contract must come to an end, and the fact that a party does not achieve every desired outcome does not make it unconscionable. If that were true, nearly every contract would be rendered unconscionable.

The Companies also argue that, without one-on-one, term-by-term negotiations with each attaching entity, a contract is necessarily procedurally unconscionable. That argument, however, is inconsistent with RCW 54.04.045(2), which requires that the rates, terms, and

conditions in a PUD pole attachment agreement must be non-discriminatory among licensees.⁶⁶

The proposed agreement is also not substantively unconscionable. The challenged provisions do not “truly stand out as shocking to the conscience, monstrously harsh, and exceedingly callous, as required for substantive unconscionability. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009); *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). There are reasons for the provisions, and they appear in the Companies’ own rate attachment agreements. *See* discussion in Sections V-D-3 and 4, above.

6. The Findings of Fact regarding the proposed agreement to which the Companies assign error are supported by substantial evidence and support the Conclusions of Law.

The Companies assign error to various Findings of Fact (Appendix C-1) relating to the non-rate terms and conditions in the District’s proposed agreement. There is substantial evidence in the record supporting them.⁶⁷ The trial court’s Conclusions of Law that the non-rate

⁶⁶ The Companies also claim the agreement was procedurally unconscionable because it is a contract of adhesion. There is no evidence of this, but even if there were, a contract is not unconscionable merely because it is a contract of adhesion. *Satomi*, 167 Wn.2d at 814-15. In any event, the Companies had a choice of not signing the agreement or paying at new rates, and removing their equipment from the District’s poles.

⁶⁷ **FOF 14 and FOF 15** (*see* citations to record at footnotes 45 and 46, above); **FOF 22** (RP 185:25-186:10; CenturyTel Brief, p. 12); **FOF 24** (RP 186:5-7, 1183:15-17, 1572:1-3; CenturyTel Brief, p. 12); **FOF 25** (Exs. 1-3, §§ 17(c), 21 (second paragraph), and 24; RP 95:14-97:12, 953:11-18); **FOF 26** (*see* FOF 14 and FOF 15 and citations to record supporting them in footnotes 45 and 46, above; *see* FOF 22 and FOF 24 and citations to record supporting them in this footnote, and supporting FOF 23 in footnote 69, below; FOF 8-10, 13, 16, and 19-21); **FOF 29** (Exs. 93-102, 139-40, 142-151, 176-179, and 182); *see also* citations to Company employee testimony on this subject in Section V-D-3 of this Brief (second to last paragraph before Section V-D-4); **FOF 30 and 31** (*see*

terms and conditions of the District's proposed agreement do not violate RCW 54.04.045 are supported by its Findings of Fact. There was no error in this regard.

7. This Court should reject the Companies' argument that the entire agreement should be voided.

As shown above, the proposed agreement is not unjust or unreasonable, or procedurally or substantively unconscionable. This Court should not reverse the trial court's decision on those points.

Even if this Court were to find some provision of the proposed agreement inconsistent with RCW 54.04.045, however, it should not void the entire agreement. Where, as here, a contract contains a severability clause, (Ex. 38, § 2, p. 32), the courts strike only the specific terms the court determines to be objectionable. The essential terms of the agreement can be carried out.⁶⁸ See FOF 27. This Court should not abandon the established practice of Washington courts of examining individual contract clauses, rather than contracts as a whole -- particularly in the case of unconscionability claims. *Torgerson*, 166 Wn. 2d at 517-23. There is no basis for voiding the entire agreement.

citations to record in Section V-D-3 and V-D-4 of this Brief); **FOF 32** (see citations to record regarding unconscionability in Section V-D-5 of this Brief (including citations in footnote 65); see FOF 30 and FOF 31 and citations to record supporting them in Sections V-D-3 and V-D-4 of this Brief; FOF 27 and FOF 28; RP 340:12-14, 346:1-12, 1660:19-1662:1).

⁶⁸ Relying on a third Circuit decision based on Virgin Islands Law, the Companies claim the entire contract should be voided. Even under that case, however, they must demonstrate that the primary purpose of the contract is defeated by the invalid provisions, which they cannot do.

E. The Trial Court's Award of Damages to the District Should be Affirmed.

Comcast and Charter challenge the award of damages on two grounds: (1) failure to mitigate damages; and (2) the interest rate for prejudgment interest.⁶⁹ CenturyTel does not provide any briefing with respect to the trial court's award of damages to the District, and should not be heard on that issue. *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (Div. II 2002).⁷⁰

1. The damages awarded should not be reduced based on the defense of failure to mitigate damages.

The Court should reject the Companies' claim that the District's not accepting and depositing their checks for partial payment constitutes failure to mitigate damages. This Court has succinctly summarized the doctrine of failure to mitigate damages.

The doctrine of avoidable consequences, or mitigation of damages, prevents an injured party from recovering damages that the party could have avoided through reasonable efforts. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004) Courts allow a wide latitude of discretion to the person who, by another's wrong, has been forced into a predicament where he is faced with a probability of injury or loss. *Labriola*, 152 Wn.2d at 840 If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that the injured party chose one over the other. *Labriola*, 152 Wn.2d at 840

⁶⁹ Comcast and Charter assert that **FOF 23** (Appendix C-1) was error. That finding states that the Companies never paid the District at the new Commission-adopted pole attachment rates. The record supports that finding. RP 185:25-186:4, 334:13-18, 1183:4-7, 1571:15-25; Comcast/Charter Brief, p. 7 n.2.

⁷⁰ Testimony and exhibits demonstrated the calculation of damages owed to the District. *See, e.g.*, RP 207:11-211:7; Exs. 44-57.

Jaeger v. Cleaver Constr., Inc., 148 Wn. App. 698, 714-15, 201 P.3d 1028 (Div. II 2009) (additional citations omitted). The party whose wrongful conduct caused the damages has the burden of proving the failure to mitigate. *Cobb v. Snohomish County*, 86 Wn. App. 223, 230, 935 P.2d 1384 (Div. I 1997).

The District's General Manager testified the District returned the Companies' checks because they did not reflect the full amount due. RP 334:21-335:8. Exhibit 939, a letter from CenturyTel to the District, exemplifies why that was reasonable. It states:

Enclosed please find CenturyTel check number 0001904453 in the amount of \$18,984.00 which is tendered in an effort to **completely fulfill** CenturyTel's 2007 rental payment obligations. We also hope that this payment highlights CenturyTel's desire and commitment to continue negotiating towards an agreement that is acceptable to both parties.

The PUD did not invoice CenturyTel for 2007 rental, but CenturyTel wanted to ensure that it had offered to **fully satisfy** its 2007 payment obligations. Please note that the rental rate of \$8.00 per pole is used because it is the last lawful rate that had been established by the parties.

Ex. 939 (emphasis added).

This was a classic "accord and satisfaction" scenario involving the risk of accepting less than payment in full. *See, e.g., State Dept. of Fisheries v. J-Z Sales Corp.*, 25 Wn. App. 671, 676, 680, 610 P.2d 390 (Div. II 1980). Here, there was a dispute between the District and the Companies over the amount of pole attachment fees owed. CenturyTel offered a check for a lesser sum, indicating that the payment was "to

completely fulfill” and “to fully satisfy” its obligation.⁷¹ If the District had accepted and cashed the check, an accord and satisfaction would have occurred, and the District’s previously existing claim would have been discharged and all defenses and arguments based on the underlying obligation extinguished. *N.W. Motors, Ltd. v. James*, 118 Wn.2d 294, 305, 822 P.2d 280 (1992). This is exactly the kind of situation where a party “has been forced into a predicament” by the party causing a wrong, which the courts hold does not constitute failure to mitigate damages, because, having been put in that situation, the party acted reasonably. *Jaeger*, 148 Wn. App. at 714-15 (citing *Labriola*, 152 Wn.2d at 840).

The Companies cite no Washington case holding that the failure of one party to accept a proffered payment in a lower amount than what was demanded constitutes a failure to mitigate damages. The law is to the contrary. The Court should reject the defense of failure to mitigate damages.

2. A 12% rate for prejudgment interest was not error.⁷²

RCW 4.56.110(4) limits interest to the maximum rate permitted under RCW 19.52.020, which is 12% per annum. This Court recently held that the correct annual prejudgment interest rate where no specific interest rate is agreed on by the parties is 12%. *Dave Johnson Ins.*, 167 Wn. App. at 775-76 (citing *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 36, 100

⁷¹ Comcast and Charter also offered less than payment in full. RP 185:25-186:4, 334:9-18, 1183:4-7, 1171:15-25; Comcast/Charter Brief, p. 7 n.2.

⁷² The Companies do not challenge the applicability of prejudgment interest here, presumably because there is no question that the amount of pole attachment fees they owe the District is a liquidated amount.

P.3d 814 (2004)). Here, there was no specific interest rate agreed on by the parties. Exs. 1-4. The trial court did not abuse its discretion in awarding prejudgment interest at 12%. *Dave Johnson Ins.*, 167 Wn.2d at 775.

Despite this Court's decision in *Dave Johnson Ins.*, the Companies argue that prejudgment interest should be limited to 5%, because that was one of the calculations one of the District's witnesses made. But the District General Manager testified to damages calculated at 12% per annum (RP 207:7-211:7; Ex. 57) – consistent with RCW 4.56.110(4) and RCW 19.52.020, and with this Court's decision in *Dave Johnson Ins.*⁷³ Indeed, as COL 43 indicates, if the Companies had signed the District's proposed pole attachment agreement, the interest rate would have been 50% higher than 12% (1.5% per month, or 18% per annum). RP 209:25-210:9; Ex. 38, p. 9 (§ 3.5). There was no abuse of discretion in awarding 12% prejudgment interest.

F. The District is Entitled to its Attorneys' Fees and Expenses in the Trial Court and on Appeal, Including Those Relating To the Companies' Untimely Appeal.

1. Basic Principles.

A prevailing party is entitled to an award of attorneys' fees and expenses if permitted by contract, statute, or some recognized ground in equity. *Panorama Village Condominium Owners Association Board of Directors v. Allstate Insurance Co.*, 144 Wn.2d 130, 143, 26 P.3d 910

⁷³ CenturyTel's response to proposed Conclusion of Law No. 43 concedes that the highest rate of prejudgment interest permissible by law would be 12%. CP 1998, lines 15-17.

(2001); *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995). Whether there is a legal basis for awarding attorneys' is reviewed *de novo*, but a discretionary decision to award fees and expenses, and the reasonableness of such an award, is reviewed for abuse of discretion. *Gander v. Yeager*, 167 Wn. App. at 646-47. Other than their assertion that they should have been the prevailing party at trial, the Companies do not argue the grounds for the award of attorneys' fees and expenses to the District. RAP 10.3(g). Therefore, the applicable standard here is abuse of discretion.

2. The District is entitled to its attorneys' fees and costs at the trial court level on several grounds.

Section 19 of the Pole Rental Agreements between the District and the Companies' predecessors/assignors under these agreements provides:

In the event Licensor brings any action or suit against Licensee for breach of this entire agreement, Licensor shall be entitled to recover in addition to any judgment or decree for costs, such sum as the court shall judge reasonable as attorneys' fees.

Exs. 1-3, Section 19.

Section 17(c) of the same Pole Rental Agreements provide:

Licensee further agrees to indemnify and hold harmless Licensor, its agents and employees, from any and all claims of any kind or nature, loss, damage, injury, or death to any person or persons whomsoever, or property rights arising from or in any way connected, either directly or indirectly, with the Licensee's installation, occupancy, presence, use, or maintenance of Licensee's equipment facilities, or service on or over the Licensor's poles or right-of-way. Said indemnity and hold harmless shall apply equally to costs, expenses and attorneys fees incurred by the Licensor

Exs. 1-3. Section 17(c), therefore, requires the Companies to pay for all District claims and losses of any kind, in any way connected with the Companies' occupancy and use of the District's poles, including attorneys' fees and expenses.

The termination of the agreements by the District did not relieve the Companies from these obligations.

Any termination of this agreement in whole or in part shall not release Licensee from any liability or obligation hereunder, whether of indemnity or otherwise, which may have accrued or which may thereafter accrue or which arises out of any claim or claims that may have accrued or thereafter accrue under the terms of this agreement.

Exs. 1-3, Section 24, second paragraph.

Thus, under either Section 19 or Section 17(c) of the District's agreements with the Companies (from which, under Section 24 of the agreement, the Companies were not released from any liability or obligation after the agreements' termination), the Companies are obligated to indemnify and hold the District harmless, and to pay attorneys' fees and costs, arising from the Companies' attachments on the District's poles. Therefore, the Companies are obligated by contract to pay the District's attorneys' fees and costs.⁷⁴

⁷⁴ Section 24 of these predecessor agreements also provides that the District could terminate the agreement on six months' written notice, that during that six month period the Companies were required to remove their equipment from the District's poles, and, if they failed to do so, the District could remove it at the Companies' risk and expense. The evidence established that the District gave the required notice of termination of the old agreements and advised the Companies that they would have to either execute a new agreement or remove their equipment within the required time period. FOF 8. The Companies refused to do either, and threatened the District with injunctions and liability

3. The District is the prevailing party.

The Companies' argue the District should not be the prevailing party and, therefore, should not be entitled to its fees and costs. As demonstrated above, this Court should affirm the trial court's decision on the merits in favor of the District.

4. The Court should not reverse the trial court's award of the District's expert witness expenses.

The Companies assert that the fees of EES Consulting, the District's expert witness on rates and other terms and conditions, were unreasonably high and had insufficient detail, claiming there was no evidence the EES work was even performed on this lawsuit. The record, however, establishes that the amounts awarded for the work of EES were for work on this lawsuit, not other work for the District. CP 1338, ¶¶ 25-26; CP 1853, ¶ 5; CP 1864-1905.⁷⁵ The trial court heard the testimony of Gary Saleba of EES and entered specific Findings of Fact/Conclusions of Law regarding his firm's work.

The fees and expenses of EES consulting totaling \$251,150.11 billed to and paid by the District are

if it removed the Companies' attachments. The Companies, therefore, forced the District to bring this lawsuit, which, under this provision as well as others in the agreement, and basic equitable principles of estoppel, was at the Companies' risk and expense. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002).

The same result is reached by examining the pole attachment agreement the District proposed to the Companies, which they refused to sign. Section 16.6 of that agreement (Ex. 38) provides: "Attorneys' Fees. If Licensor brings a successful action in a Court of competent jurisdiction to enforce this agreement, Licensee shall pay Licensor's reasonable attorneys' fees." The trial court determined that the Companies' failure to execute the proposed agreement was improper. The Companies are estopped to deny the validity of the proposed agreement, and, in particular, Section 16.6 regarding recovery of attorneys' fees. *Department of Ecology, supra*.

⁷⁵ The EES invoices are for work beginning in October 2008, ten months after this lawsuit was filed.

reasonable expenses incurred in connection with this lawsuit. They were paid directly by the District to EES Consulting for expert witness work, and the documentation is sufficient to enable the Court to make this determination. The EES Consulting expenses are awarded to the District.

FOF (Fees) 19 (Appendix C-2).

Comcast and Charter argue that Mr. Saleba's testimony was not mentioned in the trial court's initial Memorandum Decision or its substantive Findings of Fact and Conclusions of Law. They offer no authority for that being relevant to whether the trial court abused its discretion in awarding those expenses to the District. Furthermore, it is noteworthy that Mr. Saleba's testimony was not expressly discredited by the trial court, as was the testimony of the Companies' expert witness, Patricia Kravtin. Memorandum Decision, ¶ 13; FOF 34-36.

Comcast and Charter cite *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App 760, 115 P.3d 349 (Div. I 2005), in support of their argument regarding the EES expenses, but that decision, from Division I, is about attorneys' fees, particularly the Lodestar approach, not about expert witness fees and expenses. 128 Wn. App. at 773. Furthermore, unlike here, the trial court in *Crest* failed to provide a written basis for the award. 128 Wn. App at 773-74.⁷⁶ The Companies' citation to *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), fares no better. That case

⁷⁶ Similarly, *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), also involved an award of attorneys' fees, not expert witness fees and expenses. The Court there relied solely on the number of hours billed as reflected in the attorney's billing records, and made no independent decision as to the reasonableness of the attorneys' fees awarded. 107 Wn.2d at 744.

also involved attorneys' fees (particularly the Lodestar approach), not expert witness fees and expenses. More significantly, there were no Findings of Facts or Conclusion of Law entered in that case at all, which the Court held were required. 135 Wn.2d at 435. By contrast, the trial court here entered detailed Findings of Fact and Conclusions of Law supporting its award of the District's attorneys' fees and costs.

The trial court did not abuse its discretion in awarding the amounts the District paid to EES Consulting for expert witness fees and expenses.

5. The trial court did not err in entering the challenged Findings of Fact regarding attorneys' fees and costs.

Comcast and Charter assert error as to Findings of Fact/ Conclusions of Law 4-7, 19, and 24 relating to fees and expenses at trial (Appendix C-2). Those Findings and Conclusions are supported by the record and consistent with law.⁷⁷

CenturyTel does not assert any specific error to any of the Findings of Fact or Conclusions of Law on the award of attorneys' fees and costs. And then, CenturyTel says it "adheres to the arguments made below" regarding the District's claimed fees and costs. CenturyTel Brief, p. 48

⁷⁷ **FOF/COL (fees) 4** (simply states the District is the prevailing party and entitled to an award of attorneys' fees and expenses if permitted by contract, statute, or some recognized ground in equity) **FOF/COL (fees) 5** (Exs. 1-3; RP 90:18-91:15, 92:19-93:12, 94:8-14, 94:21-95:7); **FOF/COL (fees) 6** (states the Companies refused to sign the new agreement and refused to remove their equipment from the District's poles, so the District had to file this lawsuit, and estoppel should apply; RP 185:25-186:10); **FOF/COL (fees) 7** (states the trial court ruled the Companies' failure to execute the new agreement was improper, and they are, therefore, estopped to deny the validity of Sections 16.6 providing for recovery of attorneys' fees; that is what the trial court ruled.); **FOF/COL (fees) 19** (relates to the expenses of EES Consulting, which are discussed in Section V-F-4, above); **FOF/COL (fees) 24** (the final total award of attorneys' fees and litigation expenses to the District).

n.30. CenturyTel's general assignment of error No. 5 regarding the award of attorneys' fees and costs should not be heard by this Court. First, CenturyTel did not specifically challenge any of the specific findings relating to attorneys' fees and costs. As this Court has stated: "We consider unchallenged findings to be verities on appeal." *Littlefair v. Schuze*, 169 Wn. App. 659, 664, 278 P.3d 218 (Div. II 2012). Furthermore, CenturyTel's assignment of error was waived due to inadequate briefing. *Milligan v. Thompson*, 110 Wn. App. at 635 ("A party waives an assignment of error not adequately argued in its brief."). CenturyTel's brief does not contain a single citation to authority on this point, and this Court "[does] not address arguments that are not supported by cited authorities." *In Re Marriage of Fahey*, 164 Wn. App. 42, 59, 262 P.3d 128 (Div. II 2011), *rev. denied*, 173 Wn.2d 1019, 272 P.3d 850 (2012); *Regan v. McLachlin*, 163 Wn. App. 171, 178, 257 P.3d 1122 (Div. II 2011).

6. The District is entitled to its attorneys' fees and costs on appeal.

Contractual provisions awarding attorneys' fees to the prevailing party also support an award of attorneys' fees on appeal. *City of Puyallup v. Hogan*, 168 Wn. App. at 430; *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 825-26, 274 P.3d 1075, (Div. II 2012), *rev. denied*, 175 Wn.2d 1012, 287 P.3d 594 (2012). Therefore, in addition to affirming the trial court's

award of attorneys' fees and costs to the District, the District is entitled to its attorneys' fees and costs on appeal.⁷⁸

7. The Companies' argument that they are entitled to their attorneys' fees from the District should be rejected.

The Companies argue they should be the prevailing parties and should be entitled to an award of their attorneys' fees and costs from the District based on Section 19 of their pole attachment agreements (Exhibits 1-3) and the reciprocal fee-shifting provisions of RCW 4.84.330. This Court should reject this contention on several grounds.

First, this is a 180 degree shift from the position the Companies took below -- that the provisions of their agreements did not entitle the District to recover its fees and costs, even though the District prevailed at trial. CP 2001-1010, 2022-2023, 2034-2044. If this Court reverses the trial court decision on the merits (which it should not do), it should not permit the Companies to adopt this inconsistent position, and should hold them judicially estopped from doing so. *Miller v. Campbell*, 164 Wn.2d 529, 539-40, 192 P.3d 352 (2008).⁷⁹

Furthermore, the Companies never raised this argument below, and this Court should not review it. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *Sneed v. Barna*, 80 Wn. App. 843, 847,

⁷⁸ The same result is reached under principles of estoppel, as discussed above.

⁷⁹ Similarly, Comcast and Charter assign error to FOF/COL 5 (fees) regarding the very contract provision under which they claim they would be entitled to recover their fees and costs. Once again, this Court should not condone this kind of gamesmanship, whether under principles of judicial estoppel or otherwise.

912 P.2d 1035 (Div. II 1996); *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (Div. II 2007).

In addition, the District's award of attorneys' fees and costs below rested on multiple grounds, including equitable principles of estoppel. This Court can affirm the trial court's award of attorneys' fees on that ground, which would not implicate contractual fee-shifting at all.

Finally, even if this Court were to determine that contractual fee-shifting under RCW 4.84.330 was applicable here, Appellant CenturyTel would not be entitled to recover its fees and costs. RCW 4.84.330 applies only to contracts "entered into after September 21, 1977." The only contract between CenturyTel and the District at issue here with an attorney fee provision is Ex.3, and that was entered into in 1969. Ex. 3, p. 8. Thus, CenturyTel has no basis for recovery of its attorneys' fees and expenses even if it were the prevailing party.

Accordingly, for many reasons, even if the trial court decision on the merits were reversed, the Companies would not be entitled to their fees and costs from the District.

8. The District is entitled to its attorneys' fees and costs relating to the Companies' untimely appeal.

The Companies did not file their Notice of Appeal of the trial court's December 12, 2011 decision within the 30-day period required by RAP 5.2(a). They then filed a Motion to Vacate and Reenter Final Judgment in the trial court. The motion was extensively briefed, and oral argument was held. The trial court denied the Companies' Motion to

Vacate. CP 2498-2500. The Companies never appealed that order. Thus, the District was the prevailing party.

The District filed a motion for award of its attorneys' fees and expenses relating to the Motion to Vacate. There was, again, extensive briefing, followed by oral argument, and the trial court awarded the District its fees and expenses. CP 2833-34. Findings of Fact and Conclusions of Law, an Order, and Judgment were entered. CP 2829-2836 (Appendix D).

Because the District prevailed on the Companies' Motion to Vacate, it is entitled to recover its attorneys' fees and costs incurred in responding to that motion, regardless of whether the Companies ultimately prevail on appeal. Those attorneys' fees and expenses the District incurred fall within the provisions of Section 17 (c) and Section 19 of the pole attachment agreements between the District and the Companies. Exs.1-3. Furthermore, the District was not responsible for the Companies' missing the appeal deadline, resulting in their Motion to Vacate. It was the Companies' failure to file within the 30-day appeal period that caused the District to incur those fees and costs. Indeed, even if the District had been unsuccessful on the Motion to Vacate, the trial court could have imposed "terms as are just" under Civil Rule 60(b). That an award of terms would be appropriate if the District lost, but not if it won (which it did), makes no

sense. Thus, the circumstances here are appropriately treated not only as fees and costs permitted by contract, but also based on equity.⁸⁰

The same principles applicable to the award of fees and costs to the District on the Companies' Motion to Vacate in the trial court apply to the fees and costs the District incurred in motion practice in this Court and the Washington Supreme Court on the Companies' Motion for Extension of Time. Those fees and expenses would not have been incurred by the District but for the Companies' failure to file their Notice of Appeal within the required 30-day period. That is true of the District's briefing and supporting documents in responding to that motion itself, and also on the District's motion to stay proceedings in this Court pending decision on a Motion for Discretionary Review by the Supreme Court, the briefing in the Supreme Court on the Motion for Discretionary Review of this Court's February 27, 2012 Order Granting Appellant's Motion for Extension of Time, and in responding to the related motions to strike filed by the Companies in the Supreme Court (which were denied on June 5, 2012).

Under RAP 18.8(d), the Court may impose terms or compensatory damages, or both, as provided in RAP 18.9, for granting relief to a party

⁸⁰ Comcast and Charter assign error to **FOF/COL 8** entered on March 23, 2012 by the trial court in awarding the District its fees and expenses on the Motion to Vacate. Appendix D. That FOF/COL states that segregation of the fees and costs awarded among the Companies would not be proper because the Motion to Vacate was filed as joint motion by all three of the Companies and the lawsuits that were originally filed against each of the three companies individually were consolidated by stipulation of the parties. Comcast and Charter do not state why they challenge that Finding/Conclusion, and this Court should, therefore, not consider that assignment of error for lack of briefing. Furthermore, the factual recitation in that finding is supported by the record. CP 42-47, 2344-2359.

for its failure to comply with the requirement in RAP 5.2(a) of filing a Notice of Appeal within thirty days of entry of judgment. RAP 18.9(a) authorizes this Court, “to order a party who fails to comply with the Rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply....” Here, the District has incurred significant attorneys’ fees and costs, at public expense, in responding to the Companies’ Motion for Extension of Time, including the Motion for Discretionary Review, Motions to Strike, and Motion for Stay. None of these fees and costs would have been incurred if the Companies had timely filed their notice of appeal. Those fees and costs are properly awarded to the District. “A party who fails to comply with the rules of appellate procedure is subject to the imposition of sanctions” under RAP 18.9(a). *Simonson v. Fendell*, 34 Wn. App. 324, 330, 662 P.2d 54 (Div. III 1983), *rev’d on other grounds*, 101 Wn.2d 88, 675 P.2d 1218 (1984).

Accordingly, this Court should affirm the trial court’s March 23, 2012 award of attorneys’ fees and costs relating to the Companies’ Motion to Vacate. That award was not an abuse of discretion. This Court should also award the District its attorneys’ fees and costs with respect to the Companies’ Motion for Extension of Time, the District’s Motion for Stay, and the District’s Motion for Discretionary Review by the Supreme Court and related Motions to Strike.

VI. CONCLUSION

The Findings of Fact entered by the trial court are supported by substantial evidence in the record. The Conclusions of Law are supported by the Findings of Fact and were not error. The District did not violate RCW 54.04.045, and is entitled to the relief awarded.

Based on the foregoing, this Court should affirm the trial court's decisions and award the District its requested attorneys' fees and expenses.

Respectfully submitted this 16th day of January, 2013.

GORDON THOMAS HONEYWELL LLP

By 

Donald S. Cohen, WSBA No. 12480

James E. Horne, WSBA No. 12166

James B. Finlay, WSBA No. 03430

Attorneys for Respondent Public Utility
District No. 2 of Pacific County

CERTIFICATE OF SERVICE

I, Patricia Y. Quantz, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on the 16th day of January, 2013, I caused a true and correct copy of BRIEF OF RESPONDENT to be served upon the following counsel of record in the manner indicated:

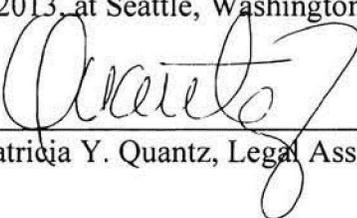
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Signed this 16th day of January 2013, at Seattle, Washington.



Patricia Y. Quantz, Legal Assistant

APPENDIX

- A. Exhibit 42 [RCW 54.04.045 (amended)]
- B. Exhibit 43 [Pole Attachment Rate Worksheet]
- C-1. Findings of Fact and Conclusions of Law (CP 2290-2313) (December 12, 2011)
- C-2. Findings of Fact and Conclusions of Law Regarding Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses (CP 2314-2320) (December 12, 2011)
- C-3. Order Awarding Attorneys' Fees and Litigation Expenses to Plaintiff (CP 2321-2323) (December 12, 2011)
- C-4. Judgment (CP 2324-2327) (December 12, 2011)
- D. Findings of Fact and Conclusions of Law Regarding Pacific PUD's Request for Attorneys' Fees and Litigation Expenses for Responding to Defendants' Motion to Vacate (CP 2829-2832); Order Awarding Attorneys' Fees and Litigation Expenses to Plaintiff for Responding to Defendants' Motion to Vacate (CP 2833-2834); Judgment for Attorneys' Fees and Expenses on Motion to Vacate (CP 2835-2836) (March 23, 2012)
- E. Exhibit 193 [RCW 54.04.045(3)(a) and (3)(b) Comparisons]
- F. Ex. 43A [Demonstrative exhibit regarding RCW 54.04.045 (amended)]
- G. Final Bill Report – E2SHB 2533
- H. HB 2533-Digest as Enacted
- I. Exhibit 196 [Excerpt from Washington State House of Representatives Floor Debate (March 8, 2008)]
- J. Exhibit 81 [Senate Bill Report – E2SHB 2533]
- K. Exhibit 201 [Pacific PUD Pole Attachment Rate Comparison]
- L. Ex. 38 [Proposed Pole Attachment License Agreement, 8/20/07]

APPENDIX A



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RCWs > Title 54 > Chapter 54.04 > Section 54.04.045

[54.04.040](#) << [54.04.045](#) >> [54.04.050](#)

RCW 54.04.045

Locally regulated utilities — Attachments to poles — Rates — Contracting.

(1) As used in this section:

(a) "Attachment" means the affixation or installation of any wire, cable, or other physical material capable of carrying electronic impulses or light waves for the carrying of intelligence for telecommunications or television, including, but not limited to cable, and any related device, apparatus, or auxiliary equipment upon any pole owned or controlled in whole or in part by one or more locally regulated utilities where the installation has been made with the necessary consent.

(b) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, which is authorized to construct attachments upon, along, under, or across public ways.

(c) "Locally regulated utility" means a public utility district not subject to rate or service regulation by the utilities and transportation commission.

(d) "Nondiscriminatory" means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments.

(2) All rates, terms, and conditions made, demanded, or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory, and sufficient. A locally regulated utility shall levy attachment space rental rates that are uniform for the same class of service within the locally regulated utility service area.

(3) A just and reasonable rate must be calculated as follows:

(a) One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities;

(b) The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole; and

(c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

(4) For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.

PLAINTIFF'S EXHIBIT
Case No. 07-2-00484-1
Exhibit No. 42

(5) Except in extraordinary circumstances, a locally regulated utility must respond to a licensee's application to enter into a new pole attachment contract or renew an existing pole attachment contract within forty-five days of receipt, stating either:

(a) The application is complete; or

(b) The application is incomplete, including a statement of what information is needed to make the application complete.

(6) Within sixty days of an application being deemed complete, the locally regulated utility shall notify the applicant as to whether the application has been accepted for licensing or rejected. In extraordinary circumstances, and with the approval of the applicant, the locally regulated utility may extend the sixty-day timeline under this subsection. If the application is rejected, the locally regulated utility must provide reasons for the rejection. A request to attach may only be denied on a nondiscriminatory basis (a) where there is insufficient capacity; or (b) for reasons of safety, reliability, or the inability to meet generally applicable engineering standards and practices.

(7) Nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.

[2008 c 197 § 2; 1996 c 32 § 5.]

Notes:

Intent – 2008 c 197: "It is the policy of the state to encourage the joint use of utility poles, to promote competition for the provision of telecommunications and information services, and to recognize the value of the infrastructure of locally regulated utilities. To achieve these objectives, the legislature intends to establish a consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide, as well as ensure that locally regulated utility customers do not subsidize licensees. The legislature further intends to continue working through issues related to pole attachments with interested parties in an open and collaborative process in order to minimize the potential for disputes going forward." [2008 c 197 § 1.]

APPENDIX B

Pole Attachment Rate Worksheet

[Based on RCW 54.04.045]

3(a) Component:

Net Cost of Bare Pole (Actual Capital)

1 Plant Value of Poles	\$	-	Gross Plant value of service and distribution poles in Acct. 364.
2 Plant Value of Anchors & Guys			Gross Plant value of anchors and guys in Acct. 364.
3 Total Gross Investment	\$	-	Line 2 added to line 3.
4 Accumulated Depreciation			Pole, Anchor & Guy Accumulated Depreciation (positive number).
5 Net Pole Investment	\$	-	Line 3 minus line 4.
6 Number of Poles			Total number of P.U.D. owned service, distribution, and transmission poles in the System.
7 Average Cost Per Base Pole		#DIV/0!	Line 5 divided by line 6.

Carrying Charges (Operating Expenses)

8 Annual Pole O & M Expenses			Total value of FERC Accts. 593 and 583.
9 Overhead Plant (Net of Depreciation)			Accts. 364, 365 and 369 less accumulated depr. for each account.
10 O & M Expenses % of Net OH Plant		#DIV/0!	Line 8 divided by line 9.
11 Annual A & G Expenses			Total value of FERC Accounts 920 through 935.
12 Annual Taxes			State Utility, State Privilege, and other Taxes.
13 Annual Interest Expense			Interest payments on financing.
14 6% Return on Equity			Retained earnings times % return.
15 Total G & A, Taxes, Int. and Return	\$	-	Sum of lines 11, 12, 13, & 14.
16 Net Plant (Including CWIP)			Gross Plant in Service plus CWIP less total accumulated depr.
17 Total G & A, Taxes, Int. and Return % of Net Plant		#DIV/0!	Line 15 divided by line 16.
18 Acct. 364 avg. expected life			Average expected life of Acct. 364 items in years
19 Annual Depreciation - Poles, Anchors & Guys		#DIV/0!	One divided by avg. expected life of Acct. 364 items times line 3.
20 Net Investment (Poles, Anchors, & Guys)	\$	-	Line 5 value.
21 Annual Depreciation % of Net Invest.		#DIV/0!	Line 19 divided by line 20.
22 Carrying Charge		#DIV/0!	Sum of lines 10, 17, and 21.

Space Factor

23 Avg. Number of attachers per pole			Average number of attachers per pole system wide.* If unknown could use FCC default number of 3 for rural areas and 5 for urban areas. Total attachments divided by total number of poles in srv. *(Remember to add one to this number to represent your electrical facilities on each pole).
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PLAINTIFF'S EXHIBIT
Case No. 07-2-00484-1
Exhibit No. <u>43</u>

24 Pole height (average)			System average pole height. Service, distribution, and transmission poles should be used if contacts allowed. Number of each size of pole times height of pole added together and divided by the total number of poles.
25 Support & Clearance			Avg. distance in feet from bottom of communications zone to butt end of pole. (Depends on Utility standard)
26 Safety Space			Avg. distance from lowest attachment to electrical neutral. (Usually 3 to 4 feet)
27 Usable Space	\$	-	Avg. pole height minus safety space and support & clearance. Line 23 minus line 24 minus line 25.
28 Space for one attachment (feet)			Avg. space in feet for each attacher. (Usually one foot).
29 Space Factor		#DIV/0!	Line 28 plus 2/3 line 25 divided by line 23 all divided by line 24.

Rate per Contact Calculation

30 Net Cost of Bare Pole		#DIV/0!	Line 7 above.
31 Carrying Charge Rate		#DIV/0!	Line 21 above.
32 Space Factor		#DIV/0!	Line 29 above.
33 Calculated Rate		#DIV/0!	Avg. Cost of Bare Pole x Carrying Charge Rate x Space Factor (Line 30 times line 31 times line 32)

Pole Attachment Rate Worksheet

[Based on RCW 54.04.045]

3(b) Component:

Net Cost of Bare Pole (Actual Capital)

1 Plant Value of Poles	\$	-	Gross Plant value of service and distribution poles in Acct. 364.
2 Plant Value of Anchors, Guys & Gnding			Gross Plant value of anchors and guys in Acct. 364.
3 Total Gross Investment	\$	-	Line 2 added to line 3.
6 Number of Poles			Total number of P.U.D. owned service, distribution, and transmission poles in the System.
7 Average Cost Per Base Pole		#DIV/0!	Line 3 divided by line 6.

Carrying Charges (Operating Expenses)

8 Annual Pole O & M Expenses			Total value of FERC Accts. 593 and 583.
9 Overhead Plant (Not Including Depr.)			Accts. 364, 365 and 369.
10 O & M Expenses % of Net OH Plant		#DIV/0!	Line 8 divided by line 9.
11 Annual A & G Expenses			Total value of FERC Accounts 920 through 935.
12 Annual Taxes			State Utility, State Privilege, and other Taxes.
13 Annual Interest Expense			Interest payments on financing.
14 6% Return on Equity			Retained earnings times % return.
15 Total A & G, Taxes, Int. and Return	\$	-	Sum of lines 11, 12, 13, & 14.
16 Net Plant (Including CWIP)			Gross Plant in Service plus CWIP.
17 Total A & G, Taxes, Int. and Return % of Plant		#DIV/0!	Line 15 divided by line 16.
18 Acct. 364 avg. expected life			Average expected life of Acct. 364 items in years
19 Annual Depreciation - Poles, Anchors, Guys & Grounds		#DIV/0!	One divided by avg. expected life of Acct. 364 items times line 3.
20 Gross Investment (Poles, Anchors, Guys & Grounding)	\$	-	Line 3 value.
21 Annual Depreciation % of Net Invest.		#DIV/0!	Line 19 divided by line 20.
22 Carrying Charge		#DIV/0!	Sum of lines 10, 17, and 21.

Space Factor

23 Avg. Number of attachers per pole			Average number of attachers per pole system wide.* If unknown could use FCC default number of 3 for rural areas and 5 for urban areas. Total attachments divided by total number of poles in srv. *(Remember to add one to this number to represent your electrical facilities on each pole).
24 Pole height (average)			System average pole height. Service, distribution, and transmission poles should be used if contacts allowed.

			Number of each size of pole times height of pole added together and divided by the total number of poles.
25 Support & Clearance			Avg. distance in feet from bottom of communications zone to butt end of pole. (Depends on Utility standard)
26 Safety Space			Avg. distance from lowest attachment to electrical neutral. (Usually 3 to 4 feet)
27 Usable Space	\$	-	Avg. pole height minus safety space and support & clearance. Line 24 minus line 25 minus line 26.
28 Space for one attachment (feet)			Avg. space in feet for each attachment. (Usually one foot).
29 Space Factor		#DIV/0!	Line 28 divided by line 27.

Rate per Contact Calculation

30 Net Cost of Bare Pole		#DIV/0!	Line 7 above.
31 Carrying Charge Rate		#DIV/0!	Line 21 above.
32 Space Factor		#DIV/0!	Line 29 above.
33 Calculated Rate		#DIV/0!	Usable Space Allowance plus Support and Clearance Space Allowance. Usable Space Allowance is the (Space Factor times (Usable Space divided by the Pole Height)) times (Carrying Charge times the Avg. Cost per Base Pole) Support and Clearance Space Allowance is the (Support & Clearance plus Safety Space divided by the Pole Height) times (Carrying Charge divided by the Avg. Number of Attachments) times the Avg. Cost per Base Pole

Pole Attachment Rates under E2SHB 2533

3(a) Component

1 Average Cost of Bare Pole	#DIV/0!	Value from Option 1a tab, Line 20 (#7)
2 Carrying Charge Rate	#DIV/0!	Value from Option 1a tab, Line 47 (#22)
3 Space Factor	#DIV/0!	Value from Option 1a tab, Line 74 (#29)
4 Calculated Rate	#DIV/0!	Value from Option 1a tab, Line 84 (#33)

3(b) Component

5 Average Cost of Bare Pole	#DIV/0!	Value from Option 1b tab, Line 17 (#7)
6 Carrying Charge Rate	#DIV/0!	Value from Option 1b tab, Line 44 (#22)
7 Space Factor	#DIV/0!	Value from Option 1b tab, Line 71 (#29)
8 Calculated Rate	#DIV/0!	Value from Option 1b tab, Line 81 (#33)

3(a) Optional Component

9 Average Cost of Bare Pole	#DIV/0!	Value from Option 1c tab, Line 20 (#7)
10 Carrying Charge Rate	#DIV/0!	Value from Option 1c tab, Line 47 (#22)
11 Space factor	#DIV/0!	Value from Option 1c tab, Line 74 (#29)
12 Calculated Rate	#DIV/0!	Value from Option 1c tab, Line 84 (#33)

Computed Pole Attachment Rate:

13 Computed Rate	#DIV/0!	1/2 3(a) Component added to 1/2 3(b) Component (1/2 line 4 plus 1/2 line 8)
------------------	---------	--

Optional Computed Pole Attachment Rate:

14 Computed Rate	#DIV/0!	1/2 3(a) Optional Component added to 1/2 3(b) Component (1/2 line 12 plus 1/2 line 8)
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Pole Attachment Rate Worksheet

[Based on RCW 54.04.045]

3(a) Optional Component:

Net Cost of Bare Pole (Actual Capital)

1 Plant Value of Poles	\$	-	Gross Plant value of service and distribution poles in Acct. 364.
2 Plant Value of Anchors & Guys			Gross Plant value of anchors and guys in Acct. 364.
3 Total Gross Investment	\$	-	Line 2 added to line 3.
4 Accumulated Depreciation			Pole, Anchor & Guy Accumulated Depreciation (positive number).
5 Net Pole Investment	\$	-	Line 3 minus line 4.
6 Number of Poles			Total number of P.U.D. owned service, distribution, and transmission poles in the System.
7 Average Cost Per Base Pole		#DIV/0!	Line 5 divided by line 6.

Carrying Charges (Operating Expenses)

8 Annual Pole O & M Expenses			Total value of FERC Accts. 593 and 583.
9 Overhead Plant (Net of Depreciation)			Accts. 364, 365 and 369 less accumulated depr. for each account.
10 O & M Expenses % of Net OH Plant		#DIV/0!	Line 8 divided by line 9.
11 Annual A & G Expenses			Total value of FERC Accounts 920 through 935.
12 Annual Taxes			State Utility, State Privilege, and other Taxes.
13 Annual Interest Expense			Interest payments on financing.
14 6% Return on Equity			Retained earnings times % return.
15 Total G & A, Taxes, Int. and Return	\$	-	Sum of lines 11, 12, 13, & 14.
16 Net Plant (Including CWIP)			Gross Plant in Service plus CWIP less total accumulated depr.
17 Total G & A, Taxes, Int. and Return % of Net Plant		#DIV/0!	Line 15 divided by line 16.
18 Acct. 364 avg. expected life			Average expected life of Acct. 364 items in years
19 Annual Depreciation - Poles, Anchors & Guys		#DIV/0!	One divided by avg. expected life of Acct. 364 items times line 3.
20 Net Investment (Poles, Anchors, & Guys)	\$	-	Line 5 value.
21 Annual Depreciation % of Net Invest.		#DIV/0!	Line 19 divided by line 20.
22 Carrying Charge		#DIV/0!	Sum of lines 10, 17, and 21.

Space Factor

23 Avg. Number of attachers per pole			Average number of attachers per pole system wide.* If unknown could use FCC default number of 3 for rural areas and 5 for urban areas. Total attachments divided by total number of poles in srv. *(Remember to add one to this number to represent your electrical facilities on each pole).
--------------------------------------	--	--	--

24 Pole height (average)			System average pole height. Service, distribution, and transmission poles should be used if contacts allowed. Number of each size of pole times height of pole added together and divided by the total number of poles.
25 Support & Clearance			Avg. distance in feet from bottom of communications zone to butt end of pole. (Depends on Utility standard)
26 Safety Space			Avg. distance from lowest attachment to electrical neutral. (Usually 3 to 4 feet)
27 Usable Space	\$	-	Avg. pole height minus safety space and support & clearance. Line 24 minus line 25 minus line 26.
28 Space for one attachment (feet)			Avg. space in feet for each attacher. (Usually one foot).
29 Space Factor		#DIV/0!	Line 28 divided by line 27 plus line 26.

Rate per Contact Calculation

30 Net Cost of Bare Pole		#DIV/0!	Line 7 above.
31 Carrying Charge Rate		#DIV/0!	Line 21 above.
32 Space Factor		#DIV/0!	Line 29 above.
33 Calculated Rate		#DIV/0!	Avg. Cost of Bare Pole x Carrying Charge Rate x Space Factor (Line 30 times line 31 times line 32)

APPENDIX C-1

HONORABLE MICHAEL J. SULLIVAN
Hearing Date: September 16, 2011 at 10:30 a.m.

2011 DEC 12 PM 4:02
lll

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This case came on for trial without a jury before the above Court beginning October 4, 2010. Plaintiff, Public Utility District No. 2 of Pacific County (the "District", the "PUD", or "Pacific PUD"), was represented by Donald S. Cohen of Gordon Thomas Honeywell LLP and James B. Finlay. Defendant Comcast of Washington IV, Inc., ("Comcast") and Defendant Falcon Community Ventures, I, L.P. d/b/a Charter Communications ("Charter") were represented by John McGrory, Eric Stahl, and Jill

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW – 1 of 19
(NO. 07-2-00484-1
[100012657.docx])

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1 Valenstein of Davis Wright Tremaine. Defendant CenturyTel of Washington, Inc.,
2 ("CenturyTel") was represented by Timothy J. O'Connell and John H. Ridge of Stoel Rives.

3 Pacific PUD requested a declaratory judgment, injunctive relief, and damages for
4 breach of contract, trespass, and unjust enrichment, relating to the District's pole
5 attachment rates and other terms and conditions. In particular, the District requested:
6

7 A. A declaratory judgment that:

8 (1) The District's pole attachment rates set forth in District Resolution No. 1256,
9 and the terms and conditions of the Pole Attachment Agreement the District proposed to
10 Defendants (the "Agreement"), are just, reasonable, and non-discriminatory, are in
11 compliance with the Washington public utility district pole attachment statute (RCW
54.04.045) both before and after its 2008 amendment, and are in all other respects in
compliance with applicable law;

12 (2) The previous Pole Rental Agreements between the District and Defendants'
13 respective predecessors (which had been assigned to defendants) terminated in 2006;

14 (3) Defendants' refusal to vacate the District's poles and remove their equipment
15 was in breach of the prior agreements;

16 (4) The District may remove and dispose of Defendants' equipment on the
17 District's poles at Defendants' expense; and

18 (5) Defendants are required to indemnify and hold the District harmless from any
19 and all claims of any kind or nature, loss, damage resulting from Defendants' actions.

20 B. Damages for Defendants' breach of the predecessor assigned agreements,
21 unjust enrichment, and trespass in the amount of unpaid pole attachment
22 rental charges, plus interest, and attorneys' fees and litigation costs; and

23 C. An injunction ordering Defendants:

24 (1) to pay in full all District pole attachment fees accrued, plus interest; and

25 (2) to either remove all of Defendant's equipment from the District's poles within
26 thirty (30) days of entry of the Court's order or to pay the District's expenses of removing
Defendants' attachments, or to enter into the new Agreement, containing the District's
terms and conditions, and to pay the pole attachment rates set by District Resolution No.
1256 for the term of that Agreement.

1 Defendants defended by asserting that the District's pole attachment rates and
2 other terms and conditions were unjust and unreasonable, and in violation of RCW
3 54.04.045, denied that the District was entitled to the relief it requested, and
4 counterclaimed for a declaratory judgment that the District's pole attachment rates,
5 terms, and conditions were in violation of RCW 54.04.045.
6

7 Testimony and exhibits were presented over seven days of trial—October 4-7,
8 October 12-13, and October 20, 2010, with closing arguments made to the Court on
9 October 20, 2010.

10 The District called the following witnesses: Douglas L. Miller (District General
11 Manager), Jason Dunsmoor (District Chief of Engineering and Operations), Mark Hatfield
12 (District Finance Manager), and Gary Saleba (expert witness).

13 Defendants called the following witnesses: Al Hernandez (Comcast Regional
14 Manager of Engineering/Outside Plant), Max Cox (CenturyTel Director, Carrier Relations
15 Support), Gary Lee (Charter Utility Coordinator), Tom McGowan (CenturyTel Manager,
16 Joint Use Administration), Patricia Kravtin (expert witness), and Mark Simonson (expert
17 witness).
18

19 Testimony of Kathleen Moisan (CenturyTel Manager, Real Estate Transactions and
20 Analysis) was presented by deposition. The District recalled Douglas L. Miller and Jason
21 Dunsmoor as rebuttal witnesses.

22 After considering the testimony of witnesses, exhibits, briefing, and oral
23 arguments, the Court ruled in favor of the Plaintiff, Public Utility District No. 2 of Pacific
24 County, in a Memorandum Decision filed on March 15, 2011. A copy of the
25
26

1 Memorandum Decision is attached to these Findings and Conclusions as Exhibit A and
2 incorporated by this reference.

3 Having considered all testimony and evidence admitted at trial, the Court makes
4 the following Findings of Fact and Conclusions of Law.
5

6 **II. FINDINGS OF FACT**

7 1. Pacific PUD is a consumer-owned utility that is a municipal corporation
8 providing utility service in Pacific County, Washington, under the general authority of RCW
9 54.

10 2. The District has approximately 17,000 customers and is predominantly
11 rural, with a few small cities.

12 3. The District operates on a not-for-profit basis.

13 4. Defendants Comcast, Charter, and CenturyTel are investor-owned
14 companies in the business of providing various communication services to customers in
15 the State of Washington, including Pacific County, and elsewhere.

16 5. The District owns and maintains poles that allow it to furnish electricity to
17 residents of Pacific County.

18 6. Defendants provide various communication services to customers in
19 Pacific County by using copper wire, coaxial cable, or fiber optic cable, and associated
20 communications equipment, attached to the District's utility poles.

21 7. Defendants were licensed to attach to the District's poles under Pole
22 Rental Agreements they assumed by assignment from previous communications
23 providers in Pacific County. The assigned agreements dated back to the 1970s and
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1 1980s with respect to Comcast and Charter, and the 1950s and 1960s with respect to
- CenturyTel.

3 8. In February 2006, the District provided written notice as required under the
4 assigned agreements of the District's intent to terminate those agreements. The letter
5 also advised Defendants that the District planned to implement new pole attachment
6 rates effective January 1, 2007, and that the District would be providing a copy of a new
7 pole attachment agreement for Defendants' review.
8

9 9. The Comcast and Charter Agreements with the District were terminated
10 effective August 21, 2006. The District and CenturyTel subsequently agreed on a
11 December 31, 2006 termination date for the two CenturyTel/District agreements.

12 10. On January 2, 2007, at a Commission meeting open to the public, the
13 District adopted Resolution No. 1256, which revised the District's pole attachment rates
14 to \$13.25 per year effective January 1, 2007 and \$19.70 per year effective January 1,
15 2008.
16

17 11. Resolution No. 1256 followed a pole attachment rate study performed by a
18 Pacific Northwest-based outside consultant, EES Consulting, as well as District
19 management analysis and recommendation, briefings at District Commission meetings
20 which were open to the public, and two public hearings.

21 12. Prior to the adoption of Resolution No. 1256, the District's pole attachment
22 rates had remained unchanged since 1987 at \$8.00 per year for telephone companies
23 and \$5.75 per year for cable companies.
24
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1 13. No representatives of Defendants attended the two public hearings on the
2 proposed new pole attachment rates held in December 2006 or the January 2007 public
3 meeting at which Resolution No. 1256 was adopted.

4 14. The non-rate terms and conditions in the District's proposed Pole
5 Attachment Agreement involved a lengthy process which involved Commission briefings
6 at properly advertised public meetings, negotiations with Defendants, some modifications
7 to Plaintiff's initial draft agreement, and after considering PUD staff reports and
8 recommendations.

9 15. The District communicated with Defendants over a period of many months
10 during 2006-2007 by letter, email, telephone, and in person regarding obtaining
11 feedback on the new proposed Pole Attachment Agreement. The District either
12 incorporated Defendants' suggested revisions or provided reasons for not doing so.

13 16. There were three versions of the proposed Agreement sent by the District
14 to Defendants.

15 17. The District based its Pole Attachment Agreement on a template
16 agreement developed by the American Public Power Association ("APPA"), rather than
17 starting the drafting process totally on its own. The District made certain revisions to the
18 APPA model agreement to make it more directly applicable to the District. PUD
19 management, including operations, engineering, and financial personnel, were consulted
20 in developing the form of agreement proposed to Defendants.

21 18. A uniform pole attachment agreement made sense to the District for ease
22 of administration and to comply with the non-discriminatory terms and conditions
23 requirement of the PUD law.

1 19. After the first version of the proposed Agreement was sent out in spring
2 2006, a revised version of the proposed Agreement, with explanations of revisions made
3 and the reasons some revisions proposed by Defendants were not made, was sent to
4 Defendants in November 2006.

5 20. The District sent another revised version of the proposed Agreement to
6 Defendants in August 2007, and stated that by the end of October 2007, each of the
7 Defendants needed to either sign and return the Agreement or provide the District with its
8 plan for removing its facilities from the District's poles. The District sent a reminder letter
9 to the same effect in early October 2007.

10 21. Defendants advised the District in October 2007 letters that, if the District
11 attempted to remove Defendants' facilities from the District's poles, emergency services
12 in Pacific County might be disrupted and defendants would take legal action to prevent
13 removal.

14 22. Comcast, Charter, and CenturyTel refused to enter into the new Agreement
15 with the District and never executed the Agreement.

16 23. Comcast, Charter, and CenturyTel have never paid the District at the new
17 pole attachment rates established by District Resolution No. 1256 in January 2007.

18 24. Defendants' communications equipment continues to occupy the District's
19 poles without District permission.

20 25. The assigned agreements under which Defendants had attached their
21 communication equipment to the District's poles provided that, as of the effective date of
22 termination, the right to attach to the District's poles terminated and Defendants were
23 required to remove their equipment from the District's poles and, if they failed to do so,
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1 the District could remove the equipment or have it removed at Defendants' risk and
2 expense. Those agreements also provided that Defendants would indemnify and hold the
3 District harmless from any and all claims of any kind or nature, loss, or damage arising
4 from or in any way connected with Defendants' activities under their agreements. Under
5 those agreements, the termination of the agreement did not release Defendants from
6 these obligations.
7

8 26. The PUD displayed noteworthy patience in not exercising its contractual
9 right to initiate removal of Defendants' attachments during the time Defendants' did not
10 pay the adopted pole attachment rates.

11 27. Prior to and even during this trial, the parties demonstrated that their
12 respective company administrators and "on-the-ground employees" have gotten along
13 well and that disagreements have been worked out on what appears to be a somewhat
14 informal basis. This has been occurring for over twenty (20) years. The parties either
15 "worked around" non-rate bothersome or disagreeable terms, ignored them, or
16 compromised some other solution in order to "just make it work".
17

18 28. One other company with attachments on District poles executed the first
19 version of the new Pole Attachment Agreement the District proposed, even before the
20 District made revisions based on input from Defendants.

21 29. The same kinds of provisions Defendants challenged in the District's
22 proposed Agreement appear in many of Defendants' own pole attachment agreements
23 with other parties (including some where CenturyTel is the pole owner) under which they
24 continue to operate, and in other pole attachment agreements.
25
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1 30. There are credible reasons relating to safety, reliability, financial stability,
2 cost, and other District considerations for the terms and conditions of the proposed
3 Agreement Defendants challenged.

4 31. There are credible reasons for provisions in the proposed Agreement
5 Defendants challenge, including but not limited to, those relating to:
6

- 7 ▪ Tagging of fiber
- 8 ▪ Unauthorized attachment fees
- 9 ▪ Removal of attachments after agreement termination and reimbursement
10 of removal costs if not removed
- 11 ▪ Waivable requirement for a bond
- 12 ▪ Attacher responsibility for hazardous materials they bring onto the District's
13 property
- 14 ▪ Requirement of a permit for overloading, other than in an emergency
- 15 ▪ Liability and indemnification provisions providing protection to the District
- 16 ▪ Transfer or relocation of attachments
- 17 ▪ Removal of nonfunctional attachments
- 18 ▪ Inspections by the District
- 19 ▪ Annual reports on attachment locations
- 20 ▪ Furnishing copies of required insurance policies on District request
- 21 ▪ Survivability of certain continuing obligations after Agreement termination
- 22 ▪ Attorneys' fees and cost provisions
- 23 ▪ "Grandfathering" with respect to NESC requirements
- 24 ▪ Permitting requirements
- 25
- 26

- 1 ▪ Waivable professional certification requirement, including the alternative of
- 2 a "licensee in good standing"
- 3 ▪ Invoicing and payment provisions
- 4 ▪ Requirement that any assignee of the Agreement sign the Agreement
- 5 ▪ Requirement that guy wires be bonded and insulated
- 6 ▪ Requirement of District consent to placement of facilities within four feet of
- 7 the pole base

8 32. The District's actions in negotiating the Pole Attachment Agreement terms
9 and conditions were done in good faith, pursuant to the District's usual and ordinary
10 course of conducting business.

11 33. The rates the District set in Resolution No. 1256 were lower than the rates
12 recommended by its rate consultant, and were lower than the rates permitted by law.

13 34. The pole attachment rate derived by Defendant's expert witness, Patricia
14 Kravtin, is unreasonable and impractical as it relates to this case.

15 35. The opinions of Defendants' rate expert, Patricia Kravtin, were based
16 primarily on theoretical analysis of economics and public policy, rather than actual local
17 information regarding Pacific County and Pacific PUD. She had never visited Pacific
18 County prior to trial.

19 36. Defendants' rate expert Patricia Kravtin's opinion on the PUD's maximum
20 legal rate was lower than what Defendants had been voluntarily paying for over twenty
21 years.

22 37. The PUD's survey of the number of attachments, both fiber and non-fiber,
23 on PUD poles, and its estimate of attachments per pole, were accomplished in a
24 reasonable and practical manner.
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1 38. Including District transmission poles, as well as distribution poles, in the
2 District's rate calculations was reasonable, particularly in light of evidence that 65% of
3 District transmission poles have only third-party communications attachments on them.

4 39. Defendants use the safety space on the District's poles, and the safety
5 space is primarily for their benefit.

6 40. The District installs electric poles that are longer than it would require for
7 its own utility purposes in the absence of third-party attachers like Comcast, Charter, and
8 CenturyTel.

9 41. The PUD's use of the excluded pole space for light fixtures was not an
10 adopted practice, but rather was a phasing out of that use.

11 42. Estimated pole life varies from location to location due to differences in
12 climate, insect activity, moisture, and other circumstances.

13 43. The quality of cedar used for utility poles has decreased over time, and
14 there are more restrictions on permissible preservatives than in the past.

15 44. Two other companies besides Defendants which have pole attachments on
16 the District's poles have been paying at the rates the District adopted in Resolution No.
17 1256 since it was put into effect in 2007.

18 45. It would cost Defendants significantly more than what they pay the District
19 to attach to its poles if they, instead, had to purchase, install, maintain, repair, and
20 replace their own poles.

21 46. The pole attachment fees Defendants pay to the District are a small
22 fraction of Defendants' overall costs.

23 47. The District does not compete with Defendants for retail customers.
24
25
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1 48. The District was not trying to disadvantage and prevent Defendants from
2 serving customers in Pacific County.

3 49. The FCC Cable formula was developed to support a fledgling cable TV
4 industry, which is no longer a fledgling industry.

5 50. There was documentary evidence and deposition testimony by Comcast's
6 Regional Manager of Engineering/Outside Plant that the FCC Cable methodology
7 excludes unusable space, while Section 3(a) of the 2008 PUD pole attachment statute
8 includes unusable space.
9

10 51. The Senate Bill Report on the 2008 PUD pole attachment statute, and the
11 statements on the floor of the Legislature by the sponsor of that legislation, reference the
12 APPA formula as one of the components of the 2008 pole attachment statute.

13 52. The Washington State Auditor's office has never criticized the District's
14 accounting treatment for pole attachments.

15 III. CONCLUSIONS OF LAW

16 1. As a municipal corporation that is a consumer-owned utility governed by a
17 local publicly-elected Board of Commissioners, the District's actions and decisions are
18 entitled to a significant degree of discretion, under which the Court should apply an
19 "arbitrary and capricious" standard. A decision is arbitrary and capricious only if it is
20 willful and unreasoning, taken without regard to the attending facts or circumstances.
21 Where there is room for two opinions, an action is not arbitrary or capricious when
22 exercised honestly and upon due consideration

23 2. If there is a reason for an action or decision by the District, the District's
24 action or decision is not arbitrary and capricious and will be upheld. That is true even if
25 there is room for more than one view on a particular subject.
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3. Pursuant to federal law, consumer-owned utilities like the District are exempt from Federal Communications Commission regulation of pole attachment rates.

4. RCW 80.54 provides for regulation of pole attachment rates for investor-owned utilities by the Washington Utilities and Transportation Commission ("WUTC"), but does not give the WUTC rate-making jurisdiction over consumer-owned utilities like the District.

5. RCW 54.04.045, both before and after the 2008 amendments, specifically provides that the statute does not bring public utility districts under the jurisdiction of the WUTC.

6. Prior to June 12, 2008, the public utility district pole attachment statute, RCW 54.04.045, provided that PUD pole attachment rates, terms, and conditions must be "just, reasonable, non-discriminatory, and sufficient."

7. As of June 12, 2008, the same general standard remained in RCW 54.04.045, but a specific methodology was added under which pole attachment rates would be permissible as just and reasonable based on one-half calculated pursuant to Section 3(a) and one-half pursuant to Section 3(b) of that statute.

8. The "just and reasonable" standard set forth in RCW 54.04.045 does not require adopting the standards of or the interpretation given to RCW 80.54 relating to investor-owned utilities.

9. There are significant differences between investor-owned utilities and consumer-owned utilities like the District.

10. Section 3(a) of RCW 54.04.045 (2008) reflects the FCC Telecom method and Section 3(b) reflects the APPA method as of the date of trial.

11. The District acted within the bounds of the standard of "just, reasonable, non-discriminatory, and sufficient", and did not act arbitrarily or capriciously, in interpreting Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b) as the APPA formula for PUD pole attachment rates as of the date of trial.

12. The District's Commissioners adopted pole attachment rates that were just, reasonable, non-discriminatory, and sufficient, those rates being \$13.25 prior to January 1, 2008, and \$19.70 after January 1, 2008.

13. The District's pole attachment rates adopted in Resolution No. 1256 are below the maximum permissible rate under RCW 54.04.045.

14. The pole attachment rates in Resolution No. 1256 were adopted after a study and recommendations by an outside consultant and District management review, analysis, and recommendations.

15. The FCC Cable methodology for setting pole attachment rates is not necessarily the measure of reasonableness.

16. Defendants' argument that the FCC Cable methodology must be followed with respect to the District's pole attachment rates must be rejected.

17. Under Section 4 of the 2008 amendments to RCW 54.04.045, a public utility district has the option, with respect to establishing half of its pole attachment rate, of using either the calculation in Section 3(a) or the FCC Cable formula.

18. The FCC Cable methodology excludes unusable space. Section 3(a) of the 2008 amendments to RCW 54.04.045 includes unusable space.

1 19. Section 3(b) of the 2008 amendments to RCW 54.04.045 divides 100% of
2 the safety and clearance space equally among the PUD and other attachers. The APPA
3 methodology does the same thing. The FCC Telecom formula divides only two-thirds of
4 the safety and clearance space among the PUD and other attachers.

5 20. The legislative history of the 2008 amendments to RCW 54.04.045 is
6 consistent with Section 3(b) of RCW 54.04.045 being the APPA formula as of the date of
7 trial.
8

9 21. The PUD Commission's adopted rates of \$13.25 for 2007 and \$19.70
10 beginning January 1, 2008 did not violate RCW 54.04.045, either before or after the
11 2008 amendments.

12 22. The District's use of the excluded pole space for light fixtures was not
13 adopted practice, but rather a phasing out of that use.

14 23. The District's survey of the number of attachments, both fiber and non-
15 fiber, and its estimate of attachments per pole, were accomplished in a reasonable and
16 practical manner.
17

18 24. Including District transmission poles, as well as distribution poles, in the
19 District's pole count was reasonable.

20 25. A public utility district is a fiduciary of public funds and property and must,
21 therefore, be able to recover its costs and protect its ratepayers' financial and physical
22 investments. This is reflected in, among other things, the requirement in RCW 54.04.045
23 that pole attachment rates, terms, and conditions be "sufficient".
24

25 26. Only a practical basis for adopted rates is required, not mathematical
26 precision.

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1 27. Attachers on the District's poles should be responsible for more than the
2 incremental cost of their being on the poles.

3 28. The intent section of the 2008 amendments to RCW 54.04.045 expressly
4 states that one of the policies of the State of Washington is "to recognize the value of
5 infrastructure of locally-regulated utilities" and that the formula in that statute is intended
6 to "ensure that locally-regulated utility customers do not subsidize licensees."
7

8 29. The District's pole attachment rates both before and after the adoption of
9 Resolution No. 1256 and before and after the 2008 amendments to RCW 54.04.045
10 were not arbitrary or capricious.

11 30. The proposed terms and conditions of the District's new Pole Attachment
12 Agreement were just, reasonable, non-discriminatory, and sufficient, and were not
13 arbitrary or capricious.

14 31. The District's actions during the negotiation process were just and
15 reasonable, and not arbitrary or capricious.

16 32. The District met the requirements of the Open Public Meetings Act in its
17 consideration of new pole attachment rates, terms, and conditions.

18 33. The District's proposed Pole Attachment Agreement is not unconscionable.

19 34. Defendant CenturyTel's argument that it is a "provider of last resort" and
20 that means it can keep its attachments on the District's poles without paying at
21 Commission-adopted rates, and without a pole attachment agreement in place, must be
22 rejected.
23

24 35. The non-rate terms and conditions of the District's proposed Pole
25 Attachment Agreement meet the requirements of RCW 54.04.045, once a few
26

[PROPOSED] FINDINGS OF FACT
AND CONCLUSIONS OF LAW – 16 of 19
(NO. 07-2-00484-1
[100012657.docx])

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1 undisputed revisions to the Agreement are made for pole attachment application
2 processing timing and notification provisions in Sections 5 and 6 of the 2008
3 amendments.

4 36. The District's pole attachment rates, terms, and conditions are not illegal or
5 unlawful.

6 37. Defendants are liable to the District for damages for breach of contract,
7 unjust enrichment, and trespass for refusing to remove their attachments on District
8 poles, and keeping their attachments on District poles without permission.

9 38. Defendants have been unjustly enriched by using the District's poles to
10 conduct their business without paying at approved rates, and without executing the
11 District's Agreement, and failing to remove their equipment from the District's poles.

12 39. Defendants materially breached the assigned predecessor agreements
13 with the District by refusing to remove their equipment from the District's poles.

14 40. In refusing to remove their equipment from the District's poles and refusing
15 to pay the PUD's rates adopted in Resolution No. 1256, Defendants have been
16 intentionally occupying the District's property without District permission, in disregard of
17 the District's express request and instructions, and have therefore been trespassing on
18 the District's property.

19 41. The District is entitled to an award of damages against Defendants for the
20 amount of unpaid pole attachment fees calculated at the rates adopted in Resolution No.
21 1256.

22 42. The District is entitled to an award of interest on the damages awarded.

1 43. Using a 1% per month simple interest rate in determining the District's
2 damages is reasonable because, had defendants entered into the District's proposed
3 Pole Attachment Agreement when required, the interest rate would have been 50%
4 higher than that (1.5% per month or 18% per annum). In addition, 12% annual interest is
5 consistent with the permissible interest rate on a judgment under RCW 4.56.110(4).
6

7 44. Damages are awarded in favor of the District against Defendants in the
8 amount of \$802,123.65, as follows:

DEFENDANT	PRINCIPAL	INTEREST	TOTAL
Charter	\$255,992.00	\$69,978.56	\$325,970.56
CenturyTel	\$221,945.00	\$60,687.54	\$282,632.54
Comcast	\$151,976.00	\$41,544.55	\$193,520.55
TOTAL DAMAGES	\$629,913.00	\$172,210.65	\$802,123.65

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13 45. In addition to the declaratory judgment, damages, and interest awarded,
14 the District is entitled to the injunctive relief requested.

15 46. Defendants must start paying at the District's rates as set forth in
16 Resolution No. 1256 and must enter into the District's proposed Pole Attachment
17 Agreement (with revisions per Conclusion of Law 35 above), or they must remove their
18 attachments from District poles within thirty (30) days, and if not so removed, the District
19 may remove Defendants' attachments at Defendants' expense.
20

21 47. Defendants have failed to prove their case as to the District's claims and
22 all of Defendants' defenses.

23 DATED this 12th day of Dec., 2011.

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Honorable Michael J. Sullivan
Judge, Pacific County Superior Court

26
[PROPOSED] FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 18 of 19
(NO. 07-2-00484-1
[100012657.docx])

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Presented by:

GORDON THOMAS HONEYWELL LLP



Donald S. Cohen, WSBA No. 12480
dcohen@gth-law.com



James B. Finlay, WSBA No. 3430
Attorneys for Plaintiff

Exhibit A

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FILED
2011 MAR 15 PM 1:27
VIRGINIA LEAGUE OF WOMEN
PACIFIC CO. WA

BY _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PACIFIC

PUBLIC UTILITY DISTRICT NO. 2 OF)
PACIFIC COUNTY, a Washington corporation,)

Plaintiff,)

v.)

COMCAST OF WASHINGTON IV, INC.,)
a Washington corporation; CENTURY TEL)
OF WASHINGTON, INC., a)
Washington corporation; and)
FALCON COMMUNITY VENTURES I, L.P.,)
a California limited partnership, d/b/a)
CHARTER COMMUNICATIONS,)

Defendants.)

NO. 07-2-00484-1

MEMORANDUM
DECISION

The Court held trial on this matter and heard closing arguments on October 20, 2010. The Court appreciates the parties' patience in this matter. The Court has considered the testimony of witnesses, exhibits, counsels' memorandums and oral arguments and now publishes its decision.

Burden of Persuasion

The Court accepts the Plaintiff's position that the Court should apply an "arbitrary and capricious" standard against which to judge the Plaintiff's actions.

MEMORANDUM DECISION-1

The Court finds in favor of the Plaintiff, and specifically finds that:

- 1) Plaintiff's actions in negotiating the "Pole Attachment Agreement Terms and Conditions" were reasonable, fair and not arbitrary or capricious;
- 2) Plaintiff's actions during the negotiation process were done in good faith, pursuant to the Plaintiff's usual and ordinary course of conducting business;
- 3) Plaintiff met the requirements of the Public Open Meetings Act;
- 4) Section 3(a) of the RCW 54.04.045 (2008) reflects the FCC Telecom Method and Section 3(b) reflects the APPA Method;
- 5) PUD acted within the bounds of reasonableness and fairness in electing to interpret their pole rates pursuant to Paragraph 4, above;
- 6) Public Utility District (PUD) Commissioners adopted pole attachment rates that were fair, reasonable and sufficient; those rates being \$13.25 prior to January 1, 2008, and \$19.70 after January 1, 2008;
- 7) The Non-rate Terms and Conditions in Plaintiff's proposed Pole Attachment Agreement Terms and Conditions were approved by the PUD Commissioners after a lengthy process which involved property advertised, public meetings, negotiations with Defendants, some modifications to Plaintiff's initial draft agreement and after considering PUD staff reports and recommendations;
- 8) PUD displayed noteworthy patience in not exercising their contractual right to initiate removal of Defendants' attachments during the time Defendants' did not pay the adopted pole attachment rates stated in Paragraph 5, above;
- 9) Prior to and even during this trial, the parties demonstrated that their respective company administrators and "on-the-ground employees" have gotten along

MEMORANDUM DECISION-2

well and that disagreements have been worked out on what appears to be a somewhat informal basis. This has been occurring for over twenty (20) years. The parties either "worked around" non-rate bothersome or disagreeable terms, ignored them, or compromised some other solution in order to "just make it work";

10) It is clear that the real, germane issue before this Court is the rate-setting method adopted by Plaintiff and not the other non-rate matters, regardless how those non-rate matters have been presented during trial;

11) Defendants failed to demonstrate by a preponderance that PUD's use of the excluded pole space for light fixtures was an adopted practice rather than a phasing out of that system;

12) PUD's survey of the number of PUD utility poles and transmission poles was accomplished in a reasonable and practical manner as well as their estimate of attachments, both fiber and non-fiber;

13) The pole attachment rate derived by Defendant's expert witness, Patricia Krafton, is unreasonable and impractical as it relates to this case.

14) Damages should be awarded against Defendants as requested by Plaintiff: \$601,108.00, plus interest through September 30, 2010, and as adjusted through entry of Judgment;

15) Plaintiff's request to enter an order for Defendant's to start paying at PUD's adopted rates set in Paragraph 6, above, or remove their attachments from PUD poles is also granted;

16) Defendant's have also failed to prove their case as to all remaining claims;

17) Attorney's Fees and Costs are reserved for argument upon sworn declarations.

18) The Court reserved ruling on the admission of Identifications 108 and 117, excerpts from the deposition of Kathleen Moisan. Both are admitted.

The Court's decision, set forth in Paragraphs 1 – 18 are not exhaustive. The Court will entertain proposed findings and conclusions consistent with this opinion when presented.

Decided March 15, 2011.


JUDGE MICHAEL J. SULLIVAN

APPENDIX C-2

2011 DEC 12 PM 4:02

lll

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC
COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a
Washington corporation; CENTURYTEL OF
WASHINGTON, INC., a Washington
corporation; and FALCON COMMUNITY
VENTURES, I, L.P., a California limited
partnership, d/b/a CHARTER
COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

~~PROPOSED~~ FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PLAINTIFF PACIFIC PUD'S MOTION FOR
AWARD OF ATTORNEYS' FEES AND
LITIGATION EXPENSES

THIS MATTER came on for hearing before the Court on Plaintiff Pacific PUD's
Motion for Award of Attorneys' Fees and Litigation Expenses. The Court considered the
following:

- (a) Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses;
- (b) Declaration of Donald S. Cohen in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses, with attached exhibits.
- (c) Declaration of Mark Hatfield in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses, with attached Exhibits;

~~PROPOSED~~ FINDINGS OF FACT
AND CONCLUSIONS OF LAW – 1 of 7
(NO. 07-2-00484-1)
[100012557.docx] 04391.00004

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(d) Declaration of Robert M. Sulkin;

(e) Reply in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses;

(f) Supplemental Declaration of Donald S. Cohen in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses, with attached exhibits;

(g) Second Supplemental Declaration of Donald S. Cohen in Support of Motion for Award of Fees and Expenses; and

(h) The files, records, and trial in this matter.

The COURT, having been fully advised, now makes the following Findings of Fact and Conclusions of Law with respect to this Motion.

1. These Findings of Facts and Conclusions of Law are made with respect to Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses.

2. This case was initially filed by Plaintiff (the "District", the "PUD", or "Pacific PUD") as three separate lawsuits in December 2007, alleging causes of action for a declaratory judgment, damages for breach of contract, unjust enrichment, and trespass, and injunctive relief, relating to the District's pole attachment rates and other terms and conditions. The lawsuits were consolidated into a single lawsuit in May 2008.

3. The case was brought to trial on October 4, 2010, and lasted seven trial days spanning three weeks. The Court issued its Memorandum Decision in favor of the District on March 15, 2011. Contemporaneously herewith, the Court is entering Findings of Fact and Conclusions of Law on the substantive claims and defenses in this lawsuit, and a Judgment for Plaintiff.

4. Plaintiff, Pacific PUD, is the prevailing party in this litigation, on all issues. As the prevailing party, the District may be awarded attorneys' fees and expenses if permitted by contract, statute, or some recognized ground in equity. *Panorama Village*

1 *Condominium Owners Association Board of Directors v. Allstate Insurance Co.*, 144
2 Wn.2d, 130, 143, 26 P.3d 910 (2001); *McGreevy v. Oregon Mutual Insurance Co.*, 128
3 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995).

4 5. Several provisions of the Pole Rental Agreements between the District and
5 defendants, which provisions remained in effect after termination of those agreements,
6 permit the recovery of the District's attorneys' fees and expenses arising from or in any
7 way connected, either directly or indirectly, with Defendants' occupancy, presence, or use
8 of the District's poles and/or for breach of those agreements. *See, e.g.*, § 17(c), 19, and
9 24 of Plaintiff's Trial Exhibits Nos. 1, 2, and 3. These agreements were initially entered
10 into between the District and Defendants' predecessors, and were assigned, respectively,
11 to the three Defendants in this lawsuit.

12 6. In addition, Defendants refused to sign the new Agreement the District
13 proposed, and refused to remove their equipment from the District's poles after the
14 District terminated the assigned Pole Rental Agreements, as required by Section 24. The
15 District was, thus, forced to file this lawsuit, the District's attorneys' fees and costs for
16 which were at Defendants' risk and expense under basic equitable principles of estoppel.

17 7. Furthermore, this Court has ruled that Defendants' failure to execute the
18 District's new Pole Attachment Agreement was improper, and Defendants' are, therefore,
19 estopped to deny the validity of Section 16.6 of that Agreement providing for the recovery
20 of attorneys' fees.

21 8. Plaintiff's lead counsel, Donald S. Cohen, represented the District
22 throughout this lawsuit. Over the three years this litigation spanned, his billing rate was
23 as follows: 2007-\$290.00; 2008-\$315.00, 2009-\$335.00; 2010-2011-\$350.00.
24 Mr. Cohen's hourly rates were reasonable, in light of his qualifications and experience,
25 and based upon my observations in the proceedings and trial before this Court. My
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conclusion that Mr. Cohen's rates are reasonable is also supported by the Declaration of Robert M. Sulkin.

9. The hourly rates for other partners, associates, paralegals, and research librarian from Gordon Thomas Honeywell LLP are described in the Cohen Declaration (and exhibits), and are also reasonable rates.

10. Plaintiff is entitled to an award of attorneys' fees and expenses for all pre-trial and post-trial activities, hearings, and motions, including those following the entry of these Findings and Conclusions. Supplemental declarations and an amended judgment may be entered in this matter for that purpose.

11. The billing records submitted are detailed and sufficiently inform the Court of the number of hours worked, the type of work performed, and who performed the work. They are not required to be exhaustive or in minute detail. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

12. The total hours worked and recorded by the District's lead counsel and the attorneys and staff of his office are reasonable based upon my review of the time records, the history and record in this case, my observations of the proceedings, and the trial of this case.

13. The case involved multiple sets of interrogatories and requests for production of documents, production of thousands of pages of documents, a dozen depositions in four different cities, and a complicated trial with multiple witnesses and exhibits.

14. The fees of Gordon Thomas Honeywell of \$727,403.92 through September 16, 2011 were reasonable and are awarded to the District.

15. As part of this award, the District is entitled to an award for the work in bringing its Motion for Award of Attorneys' Fees and Litigation Expenses.

16. The District is also entitled to an award of litigation expenses incurred by Gordon Thomas Honeywell and reimbursed by the District, in addition to attorneys' fees. The litigation expenses are documented in detail, and the records are sufficient from which the Court may make a determination. The Gordon Thomas Honeywell expenses incurred by the District were reasonable and contributed to the success of the District in this matter. The District's litigation expenses reimbursed to Gordon Thomas Honeywell in the amount of \$63,119.03 incurred through September 16, 2011 are awarded to the District.

17. A reduction in fees and costs awarded due to the fact that only the District's breach of contract claim specifically involves fee-shifting provisions would not be proper here. The District's claims arose from a common core of related, intertwined facts, and no segregation of fees and costs among the District's claims is reasonably possible.

18. For the same reason, segregation of fees and costs awarded among defendants would not be proper here. Furthermore, the lawsuits brought individually against the three defendants were consolidated by stipulation of the parties based on agreement that there were similar claims against each defendant and similar issues of law and fact. Defendants' coordinated defense further confirms the inappropriateness of segregation of fees and costs among defendants. The only exception is the fees of Bruce Kriegman related to the Charter Chapter 11 proceeding, which should be assessed only against Charter.

19. The fees and expenses of EES Consulting totaling \$251,150.11 billed to and paid by the District are reasonable expenses incurred in connection with this lawsuit. They were paid directly by the District to EES Consulting for expert witness work, and the documentation is sufficient to enable the Court to make this determination. The EES Consulting expenses are awarded to the District.

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20. The fees and expenses of the District's General Counsel, James B. Finlay, billed to and paid by the District in connection with this lawsuit are reasonable. Mr. Finlay's charges totaled \$5,945.00. Mr. Finlay did not charge the District separately for all of his time spent in connection with this matter, but absorbed many hours of additional time through his monthly retainer. Those fees Mr. Finlay billed separately to the District were for a limited number of strategy meetings, mediation preparation, two mediations, a few strategic telephone calls, and attendance at a portion of two days of the trial. His billing rate was reasonable. The documentation is sufficient to enable the Court to make this determination. Mr. Finlay's fees are awarded to the District.

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21. The fees and expenses incurred by and paid for by the District to Bruce Kriegman Law Office in the amount of \$6,272.50 were reasonable, and are awarded to the District against defendant Charter only. The Chapter 11 bankruptcy of defendant Charter required analysis of how that might affect this lawsuit with respect to Charter, as well as coordination of various ongoing issues in the bankruptcy proceeding with matters underway in this lawsuit at that time. The documentation is sufficient to enable the Court to make this determination.

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22. The District's miscellaneous expenses in the amount of \$140.81 it paid directly for mediation binders and document shipping in connection with this lawsuit are reasonable and sufficiently documented to permit a determination to award them to the District.

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23. The estimate of attorneys' fees and expenses for September 15-16, 2011 reflected in the Second Supplemental Declaration of Donald S. Cohen in Support of Motion for Award of Fees and Expenses is reasonable.

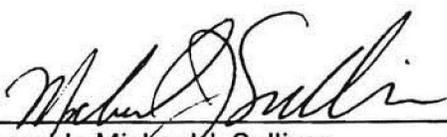
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24. By way of summary, the amount awarded to Plaintiff Pacific PUD as of this date for attorneys' fees and litigation expenses is \$1,054,031.37, as follows:

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Gordon Thomas Honeywell LLP	
Fees	\$727,403.92
Expenses	\$63,119.03
EES Consulting	\$251,150.11
James B. Finlay	\$5,945.00
Kriegman Law Office (Charter only)	\$6,272.50
Miscellaneous litigation expenses	<u>\$140.81</u>
TOTAL	\$1,054,031.37

25. Plaintiff may by supplemental declaration request an award of any additional attorneys' fees and costs incurred by plaintiff with respect to these proceedings, which may be reflected in an amended judgment.

DATED this 12th day of December, 2011.



 Honorable Michael J. Sullivan
 Pacific County Superior Court

Presented by:

GORDON THOMAS HONEYWELL LLP



 Donald S. Cohen, WSBA No. 12480
dcohen@gth-law.com
 Attorney for Plaintiff

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APPENDIX C-3

HONORABLE MICHAEL J. SULLIVAN
HEARING DATE: September 16, 2011 at 10:30 a.m.
DEC 12 PM 4:02

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SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC
COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a
Washington corporation; CENTURYTEL OF
WASHINGTON, INC., a Washington
corporation; and FALCON COMMUNITY
VENTURES, I, L.P., a California limited
partnership, d/b/a CHARTER
COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

~~PROPOSED~~ ORDER AWARDING
ATTORNEYS' FEES AND LITIGATION
EXPENSES TO PLAINTIFF

THIS MATTER having come on regularly before the undersigned Judge of the
above-entitled Court on Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and
Litigation Expenses, and the Court having considered the files and records herein, the
Motion, and the supporting Declarations of Donald S. Cohen and Mark Hatfield, including
exhibits, the Declaration of Robert M. Sulkin, the Findings of Fact and Conclusions of Law
Regarding Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation
Expenses, the submissions of Defendants in opposition to Plaintiff's Motion, Plaintiff's
Reply, and the Supplemental and Second Supplemental Declarations of Donald S. Cohen,
with exhibits, and having heard the arguments of counsel and having determined that the

~~PROPOSED~~ ORDER AWARDING ATTORNEYS' FEES
AND LITIGATION EXPENSES TO PLAINTIFF - 1 of 3
(NO. 07-2-00484-1)
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hourly rates charged by plaintiff's counsel and others in his firm were reasonable, that
2 the amount of time/hours spent was reasonable for the successful outcome of this case,
3 that the litigation expenses incurred were reasonable for the successful outcome of this
4 case, that the other fees and expenses incurred and paid by the District to EES
5 Consulting, James B. Finlay, Bruce Kriegman Law Office, and miscellaneous expenses,
6 were reasonable for the successful outcome in this case, and being otherwise duly
7 informed in the premises, now therefore,

8 IT IS HEREBY ORDERED as follows:

9 1. Plaintiff is awarded attorneys' fees against Defendants as of this date in
10 the total amount of \$739,621.42 for legal services incurred in connection with this
11 litigation as follows: Gordon Thomas Honeywell LLP – \$727,403.92; James B. Finlay –
12 \$5,945.00; and Kriegman Law Office – \$6,272.50 (against defendant Charter only).

13 2. Plaintiff is awarded litigation expenses against Defendants reimbursed by
14 Plaintiff to Gordon Thomas Honeywell LLP in connection with this litigation in the amount
15 of \$63,119.03.

16 3. Plaintiff is awarded against Defendants the expenses of EES Consulting in
17 the amount of \$251,150.11.

18 4. Plaintiff is awarded miscellaneous litigation expenses of \$140.81.

19 5. In summary, Plaintiff is, awarded attorneys' fees and litigation expenses against
20 Defendants in the total amount of \$1,054,031.37 for work through this date.

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[PROPOSED] ORDER AWARDING ATTORNEYS' FEES
AND LITIGATION EXPENSES TO PLAINTIFF – 2 of 3
(NO. 07-2-00484-1)
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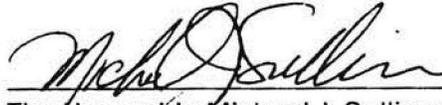
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1 6. Plaintiff may by supplemental declaration request an award of any
2 additional attorneys' fees and costs incurred by plaintiff with respect to the proceedings,
3 which may be reflected in an amended judgment

4 DATED this 12th day of Dec., 2011.

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7 The Honorable Michael J. Sullivan
8 Pacific County Superior Judge

9 Presented By:

10 GORDON THOMAS HONEYWELL LLP

11 By: 

12 Donald S. Cohen, WSBA No. 12480
13 Attorney for Plaintiff

APPENDIX C-4

HONORABLE MICHAEL J. SULLIVAN
Hearing Date: September 16, 2011 at 10:30 a.m.
2011 DEC 12 PM 4:02

lll

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation,

CAUSE NO. 07-2-00484-1

Plaintiff,

JUDGMENT

v.

11 9 00426 8

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Defendants.

JUDGMENT SUMMARY

- | | |
|--|--|
| 1. Judgment Creditor: | Public Utility District No. 2 of Pacific County |
| 2. Judgment Debtor: | Falcon Community Ventures, I, L.P., d/b/a Charter Communications |
| 3. Judgment Debtor: | CenturyTel of Washington, Inc. |
| 4. Judgment Debtor: | Comcast of Washington IV, Inc. |
| 5. Principal Judgment Amount (Total) | \$ 629,913.00 |
| 6. Prejudgment Interest (12% per annum) (Total) | \$ 172,210.65 |
| 7. Principal Judgment Amount and Prejudgment Interest (12% per annum) (Falcon Community Ventures, I, L.P., d/b/a Charter Communications) | \$ 325,970.56 |
| 8. Principal Judgment Amount and Prejudgment Interest (12% per annum) (CenturyTel of Washington, Inc.) | \$ 282,632.54 |

JUDGMENT - 1 of 4
(NO. 07-2-00484-1)
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9.	Principal Judgment Amount and Prejudgment Interest (12% per annum) (Comcast of Washington IV, Inc.)	\$ 193,520.55
10.	Attorneys' Fees	\$ 739,621.42
11.	Costs	<u>\$ 314,409.95</u>
12.	TOTAL Judgment Amount:	\$1,856,155.02

13. The total judgment amount shall bear interest at the rate of 12% per annum.

14. Attorney for judgment creditor: Donald S. Cohen
Gordon Thomas Honeywell, LLP
2100 One Union Square
600 University Street
Seattle, Washington 98101
(206) 676-7531

* * * * *

THIS MATTER came before the above-entitled Court on the presentation of Judgment in favor of Plaintiff Public Utility District No. 2 of Pacific County (the "District", the "PUD", or "Pacific PUD"). The Judgment in this matter is supported by the Court's Memorandum Decision dated March 15, 2011, the written Findings of Fact and Conclusions of Law dated September 16, 2011, the Declaration of Mark Hatfield in Support of Post-September 30, 2010 Damages (with exhibits), the Court's Order Granting Plaintiff Pacific PUD's Motion for an Award of Attorneys' Fees and Litigation Expenses dated September 16, 2011, the Court's Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for Award of Attorneys' Fees and Litigation Expenses, the Declaration of Donald S. Cohen in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses (with exhibits), the Declaration of Mark Hatfield in Support of Motion for an Award of Attorneys' Fees and Litigation Expenses (with exhibits), the Declaration of Robert M. Sulkin, Plaintiff's Reply and Supplemental and Second Supplemental Declarations of Donald S. Cohen in Support of Plaintiff's Motion for Award of Attorneys' Fees and Litigation Expenses (with exhibits), and the records and files in this lawsuit.

Consistent with the Memorandum Decision and Findings of Fact and Conclusions of Law with respect to the claims and defenses in this lawsuit, and declarations, and

2 Plaintiff's Motion, declarations (with exhibits), and Findings of Fact and Conclusions of
3 Law with respect to Plaintiff's Motion for an Award of Attorneys' Fees and Litigation
4 Expenses, the Court enters judgment in favor of Plaintiff and against Defendants as
5 follows:

6 (1) The District's pole attachment rates as set forth in Resolution No. 1256,
7 being \$13.25 prior to January 1, 2008 and \$19.70 effective January 1, 2008, were just,
8 reasonable, and non-discriminatory, are in compliance with RCW 54.04.045 (both before
9 and after its amendment effective June 12, 2008), and are in all other respects in
10 compliance with applicable law.

11 (2) Section 3(a) of RCW 54.04.045 (2008) reflects the FCC Telecom method,
12 and Section 3(b) reflects the American Public Power Association ("APPA") method for
13 public utility district pole attachment rates as of the date of trial.

14 (3) The non-rate terms and conditions in the District's proposed Pole
15 Attachment Agreement were just, reasonable, non-discriminatory, and sufficient, are in
16 compliance with RCW 54.04.045, and are in all other respects in compliance with
17 applicable law, once a few undisputed revisions to the Agreement are made for pole
18 attachment processing timing and notification provisions in Sections 5 and 6 of the 2008
19 amendments.

20 (4) Defendants' refusal to vacate the District's poles and remove their
21 equipment was in breach of continuing obligations in agreements between Defendants'
22 predecessors and the District, which had been assigned to Defendants and which
23 terminated after required notice in 2006.

24 (5) Defendants have been unjustly enriched by using the District's poles to
25 conduct their business and failing to remove their equipment from the District's poles,
26 without executing the new Agreement proposed by the District and paying for their pole
27 attachments at the rate adopted by the Commission in Resolution No. 1256.

1 (6) Defendants have been intentionally occupying the District's poles without
2 the District's permission and are liable to the District for trespass.

3 (7) Judgment for damages and attorneys' fees and litigation expenses in the
4 total amount of \$1,856,155.02 for Plaintiff against Defendants is entered, consisting of:

5 \$325,970.56 for Plaintiff's damages and interest through entry of Judgment against
6 Defendant Charter;

7 \$282,632.54 for Plaintiff's damages and interest through entry of Judgment against
8 Defendant CenturyTel;

9 \$193,520.55 for Plaintiff's damages and interest through entry of Judgment against
10 Defendant Comcast;

11 \$1,047,758.87 for Plaintiff's attorneys' fees and litigation expenses against
12 Defendants jointly and severally; and

13 \$6,272.50 for Plaintiff's attorneys' fees and costs severally against defendant Charter.

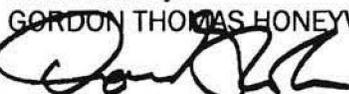
14 (8) Defendants shall pay for their attachments on the District's poles at the
15 \$19.70 rate adopted by Resolution No. 1256 unless/until such rate is changed by
16 District resolution and enter into the Pole Attachment Agreement proposed by the District
17 (revised per ¶3 above), or, alternatively, remove all of their equipment from the District's
18 poles within thirty (30) days of entry of this Judgment and, if not so removed, pay the
19 District's expenses of removing such equipment.

20 ENTERED this 12th day of Dec., 2011.

21 

22 Honorable Michael J. Sullivan
Judge, Pacific County Superior Court

23 Presented by:
24 GORDON THOMAS HONEYWELL LLP

25 
26 Donald S. Cohen, WSBA No. 12480
dcohen@gth-law.com
Attorney for Plaintiff

APPENDIX D

ORIGINAL

FILED

HONORABLE MICHAEL J. SULLIVAN
TELEPHONIC HEARING: March 23, 2012 at 11:00 a.m.
2012 MAR 23 PM 4:38

[Signature]
BY _____

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SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC
COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a
Washington corporation; CENTURYTEL OF
WASHINGTON, INC., a Washington
corporation; and FALCON COMMUNITY
VENTURES, I, L.P., a California limited
partnership, d/b/a CHARTER
COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

~~PROPOSED~~ FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PACIFIC PUD'S REQUEST FOR ATTORNEYS'
FEES AND LITIGATION EXPENSES FOR
RESPONDING TO DEFENDANTS' MOTION
TO VACATE

THIS MATTER came on for hearing before the Court on Pacific PUD's Motion for
Award of Attorneys' Fees and Litigation Expenses on Defendants' Motion to Vacate. The
Court considered the request for an award of attorneys' fees and litigation expenses
contained in:

- a. Plaintiff's Memorandum in Opposition to Defendants' Motion to Vacate and
Reenter Final Judgment;
- b. Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation
Expenses on Defendants' Motion to Vacate;

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE FEES AND EXPENSES - 1 of 4
(NO. 07-2-00484-1)
[100038078.docx] 04391 00004

LAW OFFICES
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600 UNIVERSITY, SUITE 2100
SEATTLE WA 98101-4185
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2/21

- 1 c. Declaration of Donald S. Cohen in Support of Pacific PUD's Request for
2 Attorneys' Fees and Litigation Expenses for Responding to Defendants'
3 Motion to Vacate Judgment, with attached exhibits ("Cohen Declaration");
4 and
5
6 d. The files and records in this matter.

7 The COURT, having been fully advised, now makes the following Findings of Fact
8 and Conclusions of Law with respect to this request.

9 1. These Findings of Facts and Conclusions of Law are made with respect to
10 Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses on Defendants'
11 Motion to Vacate.

12 2. The Court ruled in its February 17, 2012 Order Denying Defendants'
13 Motion to Vacate that the District was entitled to its reasonable attorneys' fees and
14 expenses in responding to the Motion.

15 3. The December 12, 2011 Findings of Fact and Conclusions of Law
16 regarding Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses are
17 hereby incorporated by this reference.

18 4. The PUD is the prevailing party in this litigation, and on Defendants' Motion
19 to Vacate per the Court's February 17, 2012 Order Denying Motion to Vacate. The fees
20 and costs of the District reflected in the Cohen Declaration were expended to obtain the
21 full benefit of the Judgment this Court entered. The same reasoning underlying the
22 Court's award of attorneys' fees and expenses reflected in the Findings of Fact and
23 Conclusions of Law Regarding Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees
24 and Litigation Expenses, entered December 12, 2011, applies here, including provisions
25
26

1 in the PUD's pole attachment agreements with Defendants providing for recovery that
2 remained in effect after termination of those agreements.

3 5. The hourly rates for Donald Cohen and other partners, associates, and
4 paralegals from Gordon Thomas Honeywell LLP, reflected in the Cohen Declaration (and
5 exhibits), are reasonable rates. My conclusion that Mr. Cohen's hourly rate is reasonable
6 is also supported by the Declaration of Robert M. Sulkin, previously submitted in this
7 matter.
8

9 6. The billing records submitted with the Cohen Declaration are detailed and
10 sufficiently inform the Court of the number of hours worked, the type of work performed,
11 and who performed the work. They are not required to be exhaustive or in minute detail.
12 The total hours worked and recorded by Gordon Thomas Honeywell personnel are
13 reasonable based upon my review of the time records and my observation of the
14 proceedings.
15

16 7. Plaintiff is entitled to an award of attorneys' fees and expenses for work in
17 responding to Defendants' Motion to Vacate and Reenter Final Judgment filed with this
18 Court. As to the limited amount of fees in the invoices related to Defendants' Court of
19 Appeals Motion, the work in responding to both motions substantially overlapped, and
20 segregation, or that limited amount of fees and costs awarded between the two motions,
21 would not be appropriate here as they are not reasonably capable of segregation.
22

23 8. Segregation of these fees and costs awarded among Defendants would
24 also not be proper here. Defendants' Motion to Vacate and Reenter Final Judgment was
25 filed as a joint motion by all three Defendants. Furthermore, the lawsuits brought
26 individually by the three Defendants were consolidated by stipulation of the parties.

1 9. Although the Court struck the Declarations of Marilyn Staricka and Angela
2 Gilbert, Pacific PUD was the prevailing party on Defendants' Motion to Vacate, and all
3 attorneys' fees and expenses the PUD incurred with respect to that Motion are
4 appropriately included in the award.

5 10. The fees and expenses of Gordon Thomas Honeywell in responding to
6 *X See # 13, below for reduction*
7 Defendants' motions totaling \$29,316.14 are reasonable and are awarded to the
8 District. A separate judgment may be entered in this matter for that purpose.

9 11. Plaintiff may by supplemental declaration request an award of any
10 additional attorneys' fees and costs incurred by Plaintiff with respect to these
11 proceedings, which may be reflected in a separate judgment.

12 *12. Court finds Plaintiff's 7.2(e) argument persuasive.*

13 DATED this *23rd* day of *March*, 2012.

14 *# 13 Court reduced award by \$1,626 = the expenses/fees relating to
15 declarations by of Court Admins.*

16 *Michael Sullivan*
17 Honorable Michael J. Sullivan
18 Pacific County Superior Court

19 Presented by:

20 GORDON THOMAS HONEYWELL LLP

21 *Donald S. Cohen*
22 Donald S. Cohen, WSBA No. 12480
23 dcohen@gtl-law.com
24 Attorney for Plaintiff
25
26

ORIGINAL

HONORABLE MICHAEL J. SULLIVAN
TELEPHONIC HEARING: March 23, 2012 at 11:00 a.m.
FILED
2012 MAR 23 PM 4:38

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BY _____
CLERK

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC
COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a
Washington corporation; CENTURYTEL OF
WASHINGTON, INC., a Washington
corporation; and FALCON COMMUNITY
VENTURES, I, L.P., a California limited
partnership, d/b/a CHARTER
COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

~~PROPOSED~~ ORDER AWARDING
ATTORNEYS' FEES AND LITIGATION
EXPENSES TO PLAINTIFF FOR
RESPONDING TO DEFENDANTS' MOTION
TO VACATE

THIS MATTER having come on regularly before the undersigned Judge of the
above-entitled Court on Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and
Litigation Expenses on Defendants' Motion to Vacate, and the Court having considered
the files and records herein, the request set forth in Plaintiff's Memorandum in
Opposition to Defendants' Motion to Vacate and Reenter Final Judgment, Plaintiff Pacific
PUD's Motion for Award of Attorneys' Fees and Litigation Expenses on Defendants'
Motion to Vacate, the Declaration of Donald S. Cohen with exhibits, the Proposed
Findings of Fact and Conclusions of Law on this Motion, Defendants' Oppositions to
Plaintiff's Motion, Plaintiff's Reply, and having heard the arguments of counsel and

~~PROPOSED~~ ORDER AWARDING FEES AND EXPENSES TO
PLAINTIFF FOR RESPONDING TO DEFS' MOTION TO VACATE - 1 of 2
(NO. 07-2-00484-1)
[100038079 docx] 04391 00004

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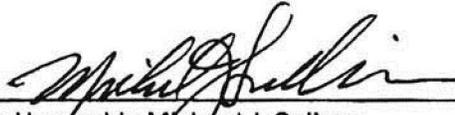
1 having determined that the hourly rates charged by Plaintiff's counsel and others in his
2 firm were reasonable, that the amount of time/hours spent was reasonable for
3 responding to Defendants' Motion to Vacate and Reenter Final Judgment, and being
4 otherwise duly informed in the premises; NOW, THEREFORE;

5 IT IS HEREBY ORDERED as follows:

6 1. Plaintiff is awarded attorneys' fees and litigation expenses against
7 Defendants, jointly and severally, in the total amount of ~~\$29,316.14~~ ^{\$27,690.14} for legal services in
8 connection with responding to Defendants' Motion to Vacate and Reenter Final
9 Judgment, which may be reflected in a separate judgment.

10 2. Plaintiff may by supplemental declaration request an award of any
11 additional attorneys' fees and expenses incurred by Plaintiff with respect to these
12 proceedings, which may be reflected in a separate judgment.

13 DATED this 23rd day of March, 2012.

14
15 
16 The Honorable Michael J. Sullivan
17 Pacific County Superior Judge

18 Presented By:
19 GORDON THOMAS HONEYWELL LLP

20
21 By: 
22 Donald S. Cohen, WSBA No. 12480
23 Attorney for Plaintiff

ORIGINAL

HONORABLE MICHAEL J. SULLIVAN
TELEPHONIC HEARING: March 23, 2012 at 11:00 a.m.
2012 MAR 23 PM 4: 38

[Handwritten signature]
BY _____

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation,

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

JUDGMENT FOR ATTORNEYS' FEES AND EXPENSES ON MOTION TO VACATE

JUDGMENT SUMMARY

- 1. Judgment Creditor: Public Utility District No. 2 of Pacific County
- 2. Judgment Debtor: Falcon Community Ventures, I, L.P., d/b/a Charter Communications
- 3. Judgment Debtor: CenturyTel of Washington, Inc.
- 4. Judgment Debtor: Comcast of Washington IV, Inc.
- 5. Judgment Amount (Total) \$ ~~20,316.14~~ 27,690.14
- 6. The total judgment amount shall bear interest at the rate of 12% per annum.
- 7. Attorney for judgment creditor: Donald S. Cohen
Gordon Thomas Honeywell, LLP
2100 One Union Square
600 University Street
Seattle, Washington 98101
(206) 676-7531

* * * * *

JUDGMENT - 1 of 2
(NO. 07-2-00484-1)
(100038060 docx)

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1 THIS MATTER came before the above-entitled Court on the presentation of
2 Judgment in favor of Plaintiff Public Utility District No. 2 of Pacific County (the "District",
3 the "PUD", or "Pacific PUD") with respect to an award of the District's attorneys' fees and
4 expenses in responding to Defendants' Motion to Vacate and Reenter Judgment. The
5 Judgment in this matter is supported by Plaintiff Pacific PUD's Motion for Award of
6 Attorneys' Fees and Litigation Expenses on Defendants' Motion to Vacate, the Findings of
7 Fact and Conclusions of Law Regarding Pacific PUD's Request for Attorneys' Fees and
8 Litigation Expenses for Responding to Defendants' Motion to Vacate, the incorporated
9 Findings of Fact Regarding Plaintiff's Motion for Award of Attorneys' Fees and Litigation
10 Expenses entered December 12, 2011, the Declaration of Donald S. Cohen in Support of
11 Pacific PUD's Request for Attorneys' Fees and Litigation Expenses for Responding to
12 Motion to Vacate with exhibits, the Order Denying Defendants' Motion to Vacate dated
13 February 17, 2012, and the records and files in this lawsuit.

14
15 Judgment in the total amount of ~~\$29,316.14~~ ^{\$27,690.14} for Plaintiff is entered against
16 Defendants, jointly and severally.
17

18 ENTERED this 23rd day of March, 2012

19
20 
21 Honorable Michael J. Sullivan
22 Judge, Pacific County Superior Court

23 Presented by:
24 GORDON THOMAS HONEYWELL LLP

25 
26 Donald S. Cohen, WSBA No. 12480
dcohen@gth-law.com
Attorney for Plaintiff

JUDGMENT - 2 of 2
(NO. 07-2-00484-1)
[100038080 docx]

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APPENDIX E

RCW 54.04.045 (3) (a) Comparisons

FCC Cable (Defendants)	RCW 54.04.045 (3) (a)	FCC Telecom (Pacific PUD)
<p>“...a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.”</p>	<p>“One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities”.</p>	<p>“A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.”</p> <p>“A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.”</p>
$= \frac{\textit{Space Occupied}}{\textit{Usable Space}}$	$= \frac{\textit{Space Occupied} + \textit{Share of Unusable Space}}{\textit{Pole Height}}$	$= \frac{\textit{Space Occupied} + \left[\frac{2}{3} * \textit{No. of Attachers} \right]}{\textit{Pole Height}}$

PLAINTIFF'S EXHIBIT
Case No. 07-2-00484-1
Exhibit No. 193

RCW 54.04.045 (3) (b) Comparisons

FCC Telecom (Defendants)	RCW 54.04.045 (3) (b)	APPA (Pacific PUD)
<p>“A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.”</p> <p>“A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.”</p>	<p>“The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole”.</p>	<p>“The formula apportions the cost of “assigned space” on the pole among all attaching entities according to the percentage of the usable space required for each entity. “</p> <p>“The formula apportions all “common Space” on a pole equally among all attaching entities. “</p>
$= \frac{\text{Space Occupied} + \left[\frac{2}{3} * \frac{\text{Unusable Space}}{\text{No. of Attachers}} \right]}{\text{Pole Height}}$	$= \frac{\text{Space Occupied} + \left[\frac{\text{Unusable Space}}{\text{No. of Attachers}} \right]}{\text{Pole Height}}$	$= \frac{\text{Space Occupied} + \left[\frac{\text{Unusable Space}}{\text{No. of Attachers}} \right]}{\text{Pole Height}}$

RCW 54.04.045 (4)

“For the purposes of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection **(3)(a)** of this section **or** it may establish a rate according to the **cable formula** set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.”

3(a) = 3(a) or FCC Cable

APPENDIX F

RCW 54.04.045

Locally regulated utilities — Attachments to poles —
Rates — Contracting.

(3) A just and reasonable rate must be calculated as follows:

(a) One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities;

FCC Telecom Formula:

$$\text{Maximum Rate} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{by Attachment}} \right) + \left(\frac{2}{3} \times \frac{\text{Support \& Clearance}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \left[\frac{\text{Net Cost}}{\text{of Bare Pole}} \right] \times \left[\frac{\text{Carrying}}{\text{Charge}} \right] \left[\frac{\text{Rate}}{\text{Rate}} \right]$$

PLAINTIFF'S EXHIBIT
Case No. 07-2-00484-1
Exhibit No. <u>43A</u>

RCW 54.04.045

Locally regulated utilities — Attachments to poles —
Rates — Contracting.

(3) A just and reasonable rate must be calculated as follows:

(b) The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole;

APPA Formula:

$$\text{Maximum Rate} = \left[\frac{\left(\text{Space Occupied by Attachment} \right) + \left(\frac{\left(\text{Support \& Clearance} \right) + \left(\text{Safety Space} \right)}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \left[\text{Gross Cost of Bare Pole} \right] \times \left[\text{Carrying Charge Rate} \right]$$

RCW 54.04.045

Locally regulated utilities — Attachments to poles —
Rates — Contracting.

(3) A just and reasonable rate must be calculated as follows:

(c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

RCW 54.04.045

Locally regulated utilities — Attachments to poles —
Rates — Contracting.

(4) For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.

FCC Cable Formula:

$$\text{Maximum Rate} = \left[\frac{\text{(Space Occupied by Attachment)}}{\text{(Comm. Space) + (Safety Space) + (Utility Space)}} \right] \times \left[\frac{\text{Net Cost of Bare Pole}}{\text{}} \right] \times \left[\frac{\text{Carrying Charge Rate}}{\text{}} \right]$$

APPENDIX G

FINAL BILL REPORT

E2SHB 2533

C 197 L 08

Synopsis as Enacted

Brief Description: Concerning attachments to utility poles of locally regulated utilities.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives McCoy, Chase and Quall).

House Committee on Technology, Energy & Communications

House Committee on Appropriations

Senate Committee on Water, Energy & Telecommunications

Background:

Telecommunications services providers often must use poles, ducts, conduits, or rights-of-way of competitors, other utility service providers, or governmental entities to serve new or expanded customer bases. The Federal Communications Commission (FCC) regulates the rates, terms, and conditions for pole attachments by cable television and telecommunications services providers or investor-owned utilities (IOUs), unless a state has adopted its own regulatory program. In Washington, the Utilities and Transportation Commission (UTC) has been granted authority to regulate attachment to poles owned by IOUs.

The UTC is prohibited from regulating the activities of consumer-owned utilities, which include public utility districts (PUDs), municipal utilities, and rural electric cooperatives. Attachments to poles owned by consumer-owned utilities are regulated by the utility's governing board. The rates, terms, and conditions made, demanded, or received by a consumer-owned utility must be just, reasonable, nondiscriminatory, and sufficient.

If a dispute arises regarding the rates, terms, or conditions of an attachment to a pole owned by a telecommunications company or an IOU, the aggrieved party may appeal to the UTC for resolution of the dispute. If dissatisfied, either party can appeal the UTC's decision to the courts.

If a dispute arises regarding an attachment to a pole owned by a consumer-owned utility, the aggrieved party may not appeal to the UTC, but may appeal to the utility's governing board or the courts.

Summary:

Pole Attachment Rates.

A PUD must establish pole attachment rates that are just and reasonable. A just and reasonable rate for an attachment to a pole owned by a PUD must be calculated using a two-part formula:

Part 1:

The first part of the formula consists of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the PUD attributable to the portion of the pole, duct, or conduit used for the pole attachment. This part of the formula must also include a share of the required support and clearance space, in proportion to the space used for the pole, as compared to all other uses available.

Part 2:

The second part of the formula consists of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the PUD attributable to the share of the required support and clearance space, which is divided equally among the PUD and all attaching licensees, in addition to the space used for the attachment. The sum of these elements is divided by the height of the pole.

A just and reasonable rate for an attachment to a pole owned by a PUD is computed by adding one-half of the rate component under Part 1 of the formula and one-half of the rate component under Part 2 of the formula.

In lieu of the calculation outlined in Part 1 of the two-part formula, a PUD may elect to establish a rate according to the FCC Cable Formula as it exists on the effective date of this act or as it may be amended by the FCC by rule in the future, provided such amendment by rule is consistent with the purposes of this act.

Request for an Attachment.

If a licensee applies for an attachment to a PUD's pole, the PUD must respond within 45 days of receipt of the request. A PUD must notify a licensee as to whether the application has been accepted or rejected within 60 days of the application being deemed complete, unless a longer time frame has been established and agreed upon by the parties. A PUD may only deny a request to attach to a pole if there is insufficient capacity or for reasons related to safety, reliability, or engineering concerns.

Legislative Findings.

It is the policy of the state to encourage the joint use of utility poles, to promote competition of telecommunications and information services, and to recognize the value of infrastructure owned by PUDs. To achieve these objectives, the Legislature intends to establish a consistent, cost-based formula for calculating pole attachment rates to ensure greater predictability and consistency in pole attachments rates statewide, as well as to ensure that PUD customers do not subsidize licensees.

Votes on Final Passage:

House	94	1	
Senate	46	3	(Senate amended)
House	92	1	(House concurred)

Effective: June 12, 2008

APPENDIX H

(DIGEST AS ENACTED)

Requires a just and reasonable rate to be calculated as follows: (1) One-half of the rate consists of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities; and

(2) One-half of the rate consists of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share of the required support and clearance space, divided equally among all attachers, which sum is divided by the height of the pole.

Allows the locally regulated utility to establish a rate according to the calculation outlined in this act or to establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on the effective date of this act, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this act.

Provides, except in extraordinary circumstances, a locally regulated utility must respond to a licensee's application to enter into a new pole attachment contract or renew an existing pole attachment contract within forty-five days of receipt.

Provides, within sixty days of an application being deemed complete, the locally regulated utility shall notify the applicant as to whether the application has been accepted for licensing or rejected. If the application is rejected, the locally regulated utility must provide reasons for the rejection. A request to attach may only be denied on a nondiscriminatory basis: (a) where there is insufficient capacity; or (b) for reasons of safety, reliability, and generally applicable engineering purposes.

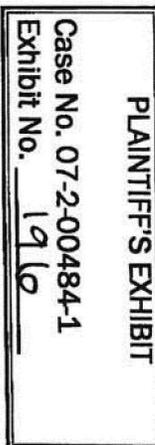
APPENDIX I

EXCERPT FROM WASHINGTON STATE HOUSE OF
REPRESENTATIVES FLOOR DEBATE
March 8, 2008

Speaker: “The question now before the House is the final passage of Engrossed Second Substituted House Bill 2533 as amended by the Senate. Remarks? The good gentleman from the 38th District, Representative McCoy.”

Mr. McCoy: “Thank you Mr. Speaker. When this Bill left this House and over to the other side, it did need a little bit of work and the Senate helped, and the stakeholders helped, fix that little formula that *we had taken a little bit of the FTC [sic] formula, a little bit of the APPA and they came up with an excellent formula for rates on pole attachments.* We concur.”

Washington State House of Representatives Floor Debate, March 8, 2008, beginning at 10:00 a.m., located at timestop 55:34 to 56:04 of 1:29:59 (emphasis added).



APPENDIX J

SENATE BILL REPORT

E2SHB 2533

As Reported By Senate Committee On:
Water, Energy & Telecommunications, February 29, 2008

Title: An act relating to attachments to utility poles of locally regulated utilities.

Brief Description: Concerning attachments to utility poles of locally regulated utilities.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives McCoy, Chase and Quall).

Brief History: Passed House: 2/18/08, 94-1.

Committee Activity: Water, Energy & Telecommunications: 2/27/08, 2/29/08 [DPA, DNP, w/oRec].

SENATE COMMITTEE ON WATER, ENERGY & TELECOMMUNICATIONS

Majority Report: Do pass as amended.

Signed by Senators Rockefeller, Chair; Murray, Vice Chair; Honeyford, Ranking Minority Member; Fraser, Hatfield, Holmquist, Morton and Pridemore.

Minority Report: Do not pass.

Signed by Senator Oemig.

Minority Report: That it be referred without recommendation.

Signed by Senator Regala.

Staff: Scott Boettcher (786-7416)

Background: Telecommunications service providers must often use poles, ducts, conduits, or rights-of-way of competitors, other utility service providers, or governmental entities to serve new or expanded customer bases. The Federal Communications Commission (FCC) regulates the rates, terms, and conditions for pole attachments by cable television and telecommunications service providers or investor-owned utilities (IOUs), unless a state has adopted its own regulatory program. In this state, the Utilities and Transportation Commission (UTC) has been granted authority to regulate attachments to poles owned by IOUs.

The UTC is specifically prohibited from regulating the activities of public utility districts (PUDs), municipal utilities, rural electric cooperatives, or consumer-owned utilities (COUs). Attachments to poles owned by COUs are regulated by the utility's governing board. COUs rates, terms, and conditions for pole attachments must be just, reasonable, nondiscriminatory, and sufficient.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

PLAINTIFF'S EXHIBIT

Case No. 07-2-00484-1

Exhibit No. 81

When a dispute arises regarding the rates, terms, or conditions of attachment to poles owned by a telecommunications company or an IOU, the aggrieved party may appeal to the UTC for resolution of the dispute. If dissatisfied, a party to the dispute may appeal a decision of the UTC to the courts. A COU aggrieved party must appeal to the utility's governing board or the courts.

Summary of Bill (Recommended Substitutes): It the policy of the state of Washington to encourage joint use of utility poles, to promote competition of telecommunications and information services, and to recognize the value of infrastructure owned by locally regulated utilities.

Locally regulated utilities must establish pole attachment rates that are just and reasonable and use a consistent cost-based formula. Just and reasonable rates must be calculated using a two-part formula. The two-part formula incorporates existing rate-setting methodologies of the Federal Communication Commission (FCC), the Washington Utilities and Transportation Commission, and the American Public Power Association. The bill allows for use of future rate-setting methodologies as set by rule by the FCC.

If a licensee makes application to attach to a locally regulated utility's pole, the locally regulated utility must respond within 45 days of receipt of the request. A locally regulated utility must notify a licensee as to whether the application has been accepted or rejected within 60 days of the application being deemed complete, unless a longer timeframe for review has been established and agreed to by the parties. A locally regulated utility may only deny a request to attach to a pole where there is insufficient capacity, or reasons of safety, reliability, or engineering concern.

EFFECT OF CHANGES MADE BY WATER, ENERGY & TELECOMMUNICATIONS COMMITTEE (Recommended Amendments): Clarifies that pole attachment rates are to be cost-based. Clarifies the method and technical components for calculating pole attachment rates. Allows for locally regulated utilities to extend the timeframe for review of complete applications based upon extraordinary circumstances and the approval of the applicant.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

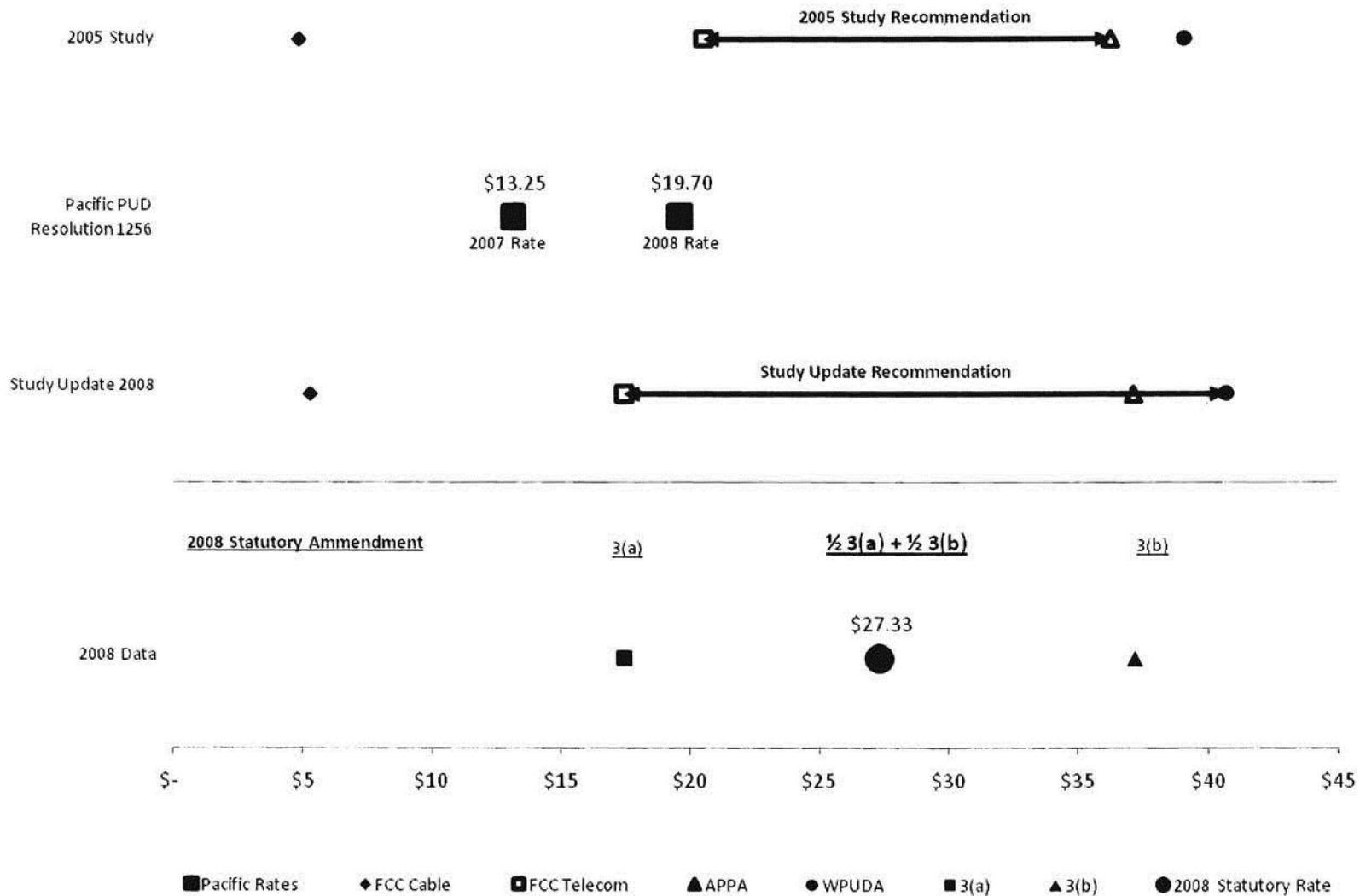
Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Second Substitute Bill: PRO: Some fine-tuning was still needed to make what passed out of the House technically workable. An agreement in concept and language has been reached and will be forwarded to staff. With these changes, the bill will meet the intent of the negotiators who've worked hard since the bill passed out of the House.

Persons Testifying: PRO: Vicki Austin, Washington Public Utility Districts Association; Ron Main, Broadband Cable Association; Terry Stapleton, Washington Independent Telephone Association; Larry Bekkedahl, Clark Public Utilities.

APPENDIX K

Pacific PUD Pole Attachment Rate Comparison



PLAINTIFF'S EXHIBIT
 Case No. 07-2-00484-1
 Exhibit No. 201

APPENDIX L



PUBLIC UTILITY DISTRICT NO. 2
OF
PACIFIC COUNTY

405 Duryea Street
P.O. Box 472
Raymond, Washington 98577
(360) 942-2411 FAX (360) 875-9388

9610 Sandridge Road
P.O. Box 619
Long Beach, Washington 98631
(360) 642-3191 FAX (360) 642-9389

August 20, 2007

Pole Attachments:

In March of 2006, your company received a draft Pole Attachment License Agreement from P.U.D. No. 2 of Pacific County for review and comment. As stated in prior correspondence, the District used a model agreement developed by the American Public Power Association as the template for the agreement we are now implementing.

Based on comments and suggestions received from the various pole attaching entities, the District prepared a revised version of the Agreement and in November 2006, this revision was mailed out for signatures. It was the intent of the District that this document would be the final version of the Agreement. However, the revised version generated additional discussion and comments and the District agreed to allow additional changes to the Agreement. Enclosed you will find the resulting new version of the Pole Attachment License Agreement, based on the latest round of suggestions.

This Agreement contains as many compromises as the District is willing to make. Having spent extra time in revising this Agreement, the District recently entered our 8th month of operation without a signed pole attachment agreement. At the direction of the Board of Commissioners, and in the interest of protecting our ratepayers, it is imperative that our Utility obtains signed agreements with the owners of all third party equipment currently attached to District owned poles.

To this end, please sign both originals of the enclosed Pole Attachment License Agreement and return both documents to the District office in Raymond, Washington no later than October 31, 2007. Once received, the District will sign the Agreement and forward one original to your company for your records.

To be clear, the District is not interested in further modifications to the enclosed Agreement. If you wish to continue to maintain your equipment on District owned poles, you need to return both copies of the Agreement, with appropriate signatures, by the date stated above. If you do not wish to remain on the District's poles, under the terms of the enclosed Agreement, please provide us with your plan for removing your facilities from the District's poles.

Thank you for your assistance in developing the Agreement. The District looks forward to receiving the signed documents back from your company and continuing the good working relationship we have had over the years.

Sincerely,

Doug Miller
General Manager

CC: Board of Commissioners



COM 00111

POLE ATTACHMENT LICENSE AGREEMENT

This Pole Attachment Licensing Agreement (the "Agreement") dated this 1st day of January, 2007 is made by and between Public Utility District No. 2 of Pacific County (hereinafter referred to as "Licensor"), a municipal corporation of the State of Washington, and Comcast Cable Communications, Inc. (hereinafter referred to as "Licensee").

Recitals

- A. Whereas, Licensee proposes to install and maintain Communications Facilities and associated communications equipment on Licensor Poles to provide Communications Services to the public; and
- B. Whereas, the Licensor is willing, when it may lawfully do so, to issue one or more Permits authorizing the placement or installation of Licensee's Attachments on District Poles, provided that the Licensor may refuse, on a nondiscriminatory basis, to issue a Permit where there is insufficient Capacity or for reasons relating to safety, reliability, generally applicable engineering purposes and/or any other Applicable Standard; and
- C. Whereas, on March 8th, 1979, Licensor and Licensee's predecessor, Willapa Harbor Cablevision, and entered into a Pole Attachment Rental Agreement and;
- D. Whereas, by registered letter dated February 21, 2006, Licensor gave notice to Licensee that Licensor was terminating the 1979 Agreement effective August 21st 2006; and
- E. Whereas, the parties intend that this Agreement replace the 1979 Agreement on its termination;
- F. Therefore, in consideration of the mutual covenants, terms and conditions and remunerations herein provided, and the rights and obligations created hereunder, the parties hereto agree as follows:

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AGREEMENT

Article 1—Definitions

For the purposes of this Agreement, the following terms, phrases, words, and their derivations, shall have the meaning given herein, unless more specifically defined within a specific Article or Paragraph of this Agreement. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The words “shall” and “will” are mandatory and “may” is permissive. Words not defined shall be given their common and ordinary meaning.

- 1.1 **Affiliate**: when used in relation to Licensee, means another entity that owns or controls; is owned or controlled by, or is under common ownership or control with Licensee.
- 1.2 **Applicable Standards**: means all applicable engineering and safety standards governing the installation, maintenance and operation of facilities and the performance of all work in or around electric Utility Facilities and includes the most current versions of National Electric Safety Code (“NESC”), the National Electrical Code (“NEC”), the regulations of the Occupational Safety and Health Administration (“OSHA”), the Washington Industrial Safety and Health Act (“WISHA”), as well as the engineering and safety standards established by the Licensor, each of which is incorporated by reference in this Agreement, and/or other reasonable Licensor provided safety and engineering requirements or other federal, state or local authority with jurisdiction over Licensor Facilities.
- 1.3 **Assigned Space**: means space on Licensor’s Poles that can be used, as defined by the Applicable Standards, for the attachment or placement of wires, cables and associated equipment for the provision of Communications Service or electric service. The neutral zone or safety space is not considered Assigned Space.
- 1.4 **Attaching Entity**: means any public or private entity, other than Licensor or Licensee, who, pursuant to a license agreement with Licensor, places an Attachment on Licensor’s Pole to provide Communications Service.

- 1.5 **Attachment(s)**: means Licensee's Communications Facilities that are placed directly on Licensor's Poles, but does not include a Riser, a service drop or support and safety attachments attached to a single Pole where Licensee has an existing Attachment on such Pole. This definition of Attachment shall exclude Overlashing, which is addressed in Article 2, section 11.
- 1.6 **Capacity**: means the ability of a Pole to accommodate an additional Attachment based on Applicable Standards, including space and loading considerations.
- 1.7 **Climbing Space**: means that portion of a Pole's surface and surrounding space that is free from encumbrances to enable Licensor employees and contractors to safely climb, access and work on Licensor Facilities and equipment.
- 1.8 **Common Space**: means space on Licensor's Poles that is not used for the placement of wires or cables but which jointly benefits all users of the Poles by supporting the underlying structure and/or providing safety clearance between attaching entities and electric Utility Facilities.
- 1.9 **Communications Facilities**: means wire or cable facilities including but not limited to fiber optic, copper and/or coaxial cables or wires utilized to provide Communications Service including any and all associated equipment. Unless otherwise specified by the parties, the term "Communications Facilities" does not include pole mounted wireless antennas, receivers or transceivers. Strand-mounted wireless equipment that does not restrict climbing space shall be considered Communications Facilities.
- 1.10 **Communications Service**: means the transmission or receipt of voice, video, data, Internet or other forms of digital or analog signals over Communications Facilities.
- 1.11 **Licensee**: means Comcast Cable Communications, Inc., its authorized successors and assignees.
- 1.12 **Make-Ready Work**: means all work, as reasonably determined by Licensor, required to accommodate Licensee's Communications Facilities and/or to comply with all Applicable Standards. Such work includes, but is not limited to, Pre-Construction Survey, rearrangement and/or transfer of Licensor Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes) or pole replacement and construction.
- 1.13 **Occupancy**: means the use or specific reservation of Assigned Space for Attachments on the same Licensor Pole.

- 1.14 **Overlash**: means to place an additional wire or cable Communications Facility onto an existing Attachment owned by Licensee.
- 1.15 **Pedestals/Vaults/Enclosures**: means above- or below-ground housings that are used to enclose a cable/wire splice, power supplies, amplifiers, passive devices and/or provide a service connection point and that shall not be attached to Licensor Poles (see Appendix D—Specifications).
- 1.16 **Permit**: means written or electronic authorization (see Appendix C) of Licensor for Licensee to make or maintain Attachments to specific Licensor Poles pursuant to the requirements of this Agreement.
- 1.17 **Pole**: means a pole owned by Licensor used for the distribution of electricity and/or Communications Service that is capable of supporting Attachments for Communications Facilities.
- 1.18 **Post-Construction Inspection**: means the inspection required by Licensor to determine and verify that the Attachments have been made in accordance with Applicable Standards and the Permit.
- 1.19 **Pre-Construction Survey**: means all work or operations required by Applicable Standards and/or Licensor to determine the potential Make-Ready Work necessary to accommodate Licensee's Communications Facilities on a Pole. Such work includes, but is not limited to, field inspection. The Pre-Construction Survey shall be coordinated with Licensor and include Licensee's representative.
- 1.20 **Reserved Capacity**: means capacity or space on a Pole that Licensor has identified and reserved for its own electric Utility requirements, pursuant to a reasonable projected need or business plan.
- 1.21 **Riser**: means metallic or plastic encasement materials placed vertically on the Pole to guide and protect communications wires and cables.
- 1.22 **Tag**: means to place distinct markers on wires and cables, coded by color or other means specified by Licensor and/or applicable federal, state or local regulations, that will readily identify, from the ground, its owner and cable type, if it is fiber cable.
- 1.23 **Utility Facilities**: means all personal property and real property owned or controlled by Licensor, including Poles and anchors.

Article 2—Scope of Agreement

- 2.1 **Grant of License.** Subject to the provisions of this Agreement, Licensor hereby grants Licensee a revocable, nonexclusive license authorizing Licensee to install and maintain permitted Attachments to Licensor's Poles.
- 2.2 **Parties Bound by Agreement.** Licensee and Licensor agree to be bound by all provisions of this Agreement and by any subsequent law.
- 2.3 **Permit Issuance Conditions.** Licensor will issue a Permit(s) to Licensee only when Licensor determines, in its sole judgment, which shall not be unreasonable withheld, that (i) it has sufficient Capacity to accommodate the requested Attachment(s), (ii) Licensee meets all requirements set forth in this Agreement, and (iii) such Permit(s) comply with all Applicable Standards.
- 2.4 **Reserved Capacity.** Access to Assigned Space on Licensor Poles will be made available to Licensee with the understanding that such access is to Licensor's Reserved Capacity only. On giving Licensee at least sixty (60) calendar days prior notice, Licensor may reclaim such Reserved Capacity anytime during the period following the installation of Licensee's Attachment in which this Agreement is effective if required for Licensor's future electric service use. Licensor shall give Licensee the option to remove its Attachment(s) from the affected Pole(s) or to pay for the cost of any Make-Ready Work needed to expand Capacity so that Licensee can maintain its Attachment on the affected Pole(s). The allocation of the cost of any such Make-Ready Work (including the transfer, rearrangement, or relocation of third-party Attachments) shall be determined in accordance with Article 9.
- 2.5 **No Interest in Property.** No use, however lengthy, of any Licensor Facilities, and no payment of any fees or charges required under this Agreement, shall create or vest in Licensee any easement or other ownership or property right of any nature in any portion of such Facilities. Neither this Agreement, nor any Permit granted under this Agreement, shall constitute an assignment of any of Licensor's rights to Licensor Facilities. Notwithstanding anything in this Agreement to the contrary, Licensee shall, at all times, be and remain a licensee only.
- 2.6 **Licensee's Right to Attach.** Unless otherwise specified in this Agreement, Licensee must have a Permit issued pursuant to Article 6, prior to attaching Licensee's Communications Facilities to any specific Pole.

- 2.7 **Licensors' Rights over Poles.** The parties agree that this Agreement does not in any way limit Licensor's right to locate, operate, maintain or remove its Poles in the manner that will best enable it to fulfill its statutory service requirements.
- 2.8 **Expansion of Capacity.** Licensor will take reasonable steps to expand Pole Capacity when necessary to accommodate Licensee's request for Attachment. Notwithstanding the foregoing sentence, nothing in this Agreement shall be construed to require Licensor to install, retain, extend or maintain any Pole for use when such Pole is not needed for Licensor's service requirements.
- 2.9 **Other Agreements.** Except as provided herein, nothing in this Agreement shall limit, restrict, or prohibit Licensor from fulfilling any agreement or arrangement regarding Poles into which Licensor has previously entered, or may enter in the future, with others not party to this Agreement.
- 2.10 **Permitted Uses.** This Agreement is limited to the uses specifically stated in the recitals stated above and no other use shall be allowed without Licensor's express written consent to such use. Nothing in this Agreement shall be construed to require Licensor to allow Licensee to use Licensor's Poles after the termination of this Agreement, subject to the provisions of Article 11 and Article 23 of this Agreement.
- 2.11 **Overlashing.** The following provisions will apply to Overlashing:
- 2.11.1 A Permit shall be obtained for each Overlashing pursuant to Article 6. Absent such authorization, Overlashing constitutes an unauthorized Attachment and is subject to the Unauthorized Attachment fee specified in Appendix A, Item 3.
- 2.11.2 In the event of an emergency or for general maintenance purposes, Licensee may Overlash its equipment without obtaining a Permit prior to Overlashing. Such Overlashed cable shall not constitute an unauthorized Attachment and shall not be subject to the Unauthorized Attachment Fee specified in Appendix A, Item 3. Such Overlashed cable shall not exceed four (4) span lengths per incident and shall be subject to all other terms and conditions of the Pole Attachment Licensee Agreement including inspection by Licensor pursuant to Licensee Overlashing. Licensee shall provide written notice to the Licensor of all such emergency or general maintenance Overlashing allowed by this Paragraph 2.11.2 within 30 days of completion of work.

- 2.11.3 If Licensee demonstrates that the Overlashing of Licensee's Attachment(s) is required to accommodate Licensee's Communications Facilities, Licensor shall not withhold Permits for such Overlashing if it can be done consistent with Paragraph 2.3. Overlashing performed pursuant to this Paragraph 2.11.3 shall not increase the Annual Attachment Fee paid by Licensee pursuant to Appendix A, Item 1. Licensee, however, shall be responsible for all Make-Ready Work and other charges associated with the Overlashing but shall not be required to pay a separate Annual Attachment Fee for such Overlashed Attachment.
- 2.11.4 If Overlashing is required to accommodate facilities of a third party, such third party must enter into a license agreement with Licensor and obtain Permits and must pay a separate Attachment Fee (Appendix A, Item 1) as well as the costs of all necessary Make-Ready Work required to accommodate the Overlashing. No such Permits to third parties may be granted by Licensor allowing Overlashing of Licensee's Communications Facilities unless Licensee has consented in writing to such Overlashing. Overlashing performed under this Paragraph 2.11.4 shall not increase the fees and charges paid by Licensee pursuant to Appendix A, Item 1. Nothing in this Agreement shall prevent Licensee from seeking a contribution from an Overlashing third party to defray fees and charges paid by Licensee.
- 2.11.5 Make-Ready Work procedures set forth in Article 7 shall apply, as necessary, to all Overlashing.
- 2.12 Enclosures. Licensee shall not place Pedestals, Vaults and/or other Enclosures on or within four (4) feet of any Pole or other Licensor Facilities without Licensor's prior written permission. If permission is granted to place a Pedestal, Vault and/or other Enclosure within four (4) feet of a Licensor's Pole, all such installations shall be per the Specifications in Appendix D of this Agreement. Such permission shall not be unreasonably withheld. If Licensor installs or relocates Licensor Facilities within four (4) feet from Licensee's existing Pedestal, vault, and/or enclosure, Licensee shall not be in violation per Article 4.5 of this Agreement.
- 2.13 Licensor Attachment to Licensee Owned Poles. In the event that the Licensor in this Agreement maintains attachments on Licensee owned poles, Licensor will compensate the Licensee by deducting the number of licensee owned poles it contacts from the number of Licensor owned poles contacted by the licensee to arrive at a net total attachments to be billed to the licensee as described in Article 3.3.

With regard to Licensee owned poles contacted by the Licensor, the Licensor agrees to abide by the terms of this Agreement as a Licensee.

Article 3—Fees and Charges

- 3.1 **Payment of Fees and Charges.** Licensee shall pay to Licensor the fees and charges specified in Appendix A and shall comply with the terms and conditions specified herein.
- 3.2 **Payment Period.** Unless otherwise expressly provided, Licensee shall pay any invoice its receives from Licensor pursuant to this Agreement within thirty (30) calendar days of the billing date of the invoice.
- 3.3 **Billing of Attachment Fee.** Licensor shall invoice Licensee for the per-pole Attachment fee annually. Licensor will submit to Licensee an invoice for the annual rental period on or about January 1 of each year. The initial annual rental period shall commence on January 1, 2007 and conclude on December 31, 2007. Each subsequent annual rental period shall commence on the following January 1st, and conclude on December 31st of the same year. The invoice shall set forth the total number of Licensor's Poles on which Licensee was issued and/or holds a Permit(s) for Attachments during such annual rental period, including any previously authorized and valid Permits.
- 3.4 **Refunds.** Except as described in Article 4.7, no fees and charges specified in Appendix A shall be refunded on account of any surrender of a Permit granted hereunder. Nor shall any refund be owed if Licensor abandons a Pole.
- 3.5 **Late Charge.** If Licensor does not receive payment for any fee or other amount owed within thirty (30) calendar days of the billing date, Licensee, upon receipt of fifteen (15) calendar days written notice, shall pay interest on the amount due to Licensor, at the maximum rate allowed by Washington State law, currently One and One Half Percent (1.5%) per month.
- 3.6 **Payment for Work.** Licensee will be responsible for payment of all reasonable costs to Licensor for all work Licensor or Licensor's contractors perform pursuant to this Agreement to accommodate Licensee's Communications Facilities.
- 3.7 **Advance Payment.** At the discretion of Licensor, Licensee may be required to pay in advance all reasonable costs, including but not limited to construction, inspections and Make-Ready Work expenses, in connection with the initial installation or rearrangement of Licensee's Communications Facilities pursuant to the procedures set forth in Articles 6 and 7 below.

- 3.8 **True Up.** Wherever Licensor, at its discretion, requires advance payment of estimated expenses prior to undertaking an activity on behalf of Licensee and the actual cost of activity exceeds the advance payment of estimated expenses, Licensee agrees to pay Licensor for the difference in cost. To the extent that the actual cost of the activity is less than the estimated cost, Licensor agrees to refund to Licensee the difference in cost.
- 3.9 **Determination of Charges.** Wherever this Agreement requires Licensee to pay for work done or contracted by Licensor, the charge for such work shall include all reasonable material, labor, engineering and applicable overhead costs. Licensor shall bill its services based upon actual costs, and such costs will be determined in accordance with Licensor's cost accounting systems used for recording capital and expense activities. All such invoices shall include an itemization of dates of work, location of work, labor costs per hour, number of persons employed by classification and materials used and cost of materials. If Licensee was required to perform work and fails to perform such work necessitating its completion by Licensor, Licensor may either charge an additional ten percent (10%) to its costs or assess the fee specified in Appendix A (4).
- 3.10 **Work Performed by Licensor.** Wherever this Agreement requires Licensor to perform any work, Licensee acknowledges and agrees that Licensor, at its sole discretion, may utilize its employees or contractors, or any combination of the two to perform such work.
- 3.11 **Default for Nonpayment.** Nonpayment of any amount due under this Agreement beyond ninety (90) days shall constitute a material default of this Agreement.

Article 4—Specifications

- 4.1 **Installation/Maintenance of Communications Facilities.** When a Permit is issued pursuant to this Agreement, Licensee's Communications Facilities shall be installed and maintained in accordance with the requirements and specifications of Appendix D. All of Licensee's Communications Facilities must comply with all Applicable Standards. Licensee shall be responsible for the installation and maintenance of its Communications Facilities. Licensee shall, at its own expense, make and maintain its Attachments in safe condition and good repair, in accordance with all Applicable Standards. Upon execution of this Agreement, Licensee is not required to modify, update or upgrade its existing Attachments where not required to do so by the terms and conditions of this or prior Agreements, prior editions of the National Electrical Safety Code (NESC) or prior editions of the National Electrical Code (NEC).

- 4.2 **Tagging.** Licensee shall Tag all of its fiber optic Communications Facilities as specified in Appendix D and/or applicable federal, state and local regulations upon installation of such Facilities, prior authorized Attachments of Licensee shall be tagged within five (5) years of the execution of this Agreement. Failure to provide proper tagging will be considered a violation of the Applicable Standards.
- 4.3 **Interference.** Licensee shall not allow its Communications Facilities to impair the ability of Licensor or any third party to use Licensor's Poles nor shall Licensee allow its Communications Facilities to interfere with the operation of any Licensor Facilities. The attachment rights subsequently granted by Licensor to other attaching entities pursuant to licenses, permits, or rental agreements shall not limit not interfere with any prior attachment rights granted to the Licensee hereunder or result in further rearrangement or make-ready costs without reimbursement.
- 4.4 **Protective Equipment.** Licensee, and its employees and contractors, shall utilize and install adequate protective equipment to ensure the safety of people and facilities, consistent with applicable standards. Licensee shall at its own expense install protective devices designed to handle the voltage and current impressed on its Communications Facilities in the event of a contact with the supply conductor, as specified in applicable standards. Except as provided in Paragraph 16.1, Licensor shall not be liable for any actual or consequential damages to Licensee's Communications Facilities or Licensee's customers' facilities.
- 4.5 **Violation of Specifications.** If Licensee's Communications Facilities, or any part thereof, are installed, used or maintained in violation of this Agreement, and Licensee has not corrected the violation(s) within sixty (60) calendar days from receipt of written notice of the violation(s) from Licensor, Licensor at its option, may correct such conditions. Licensor will attempt to notify Licensee in writing prior to performing such work whenever practicable. When Licensor reasonably believes, however, that such violation(s) pose an immediate threat to the safety of any person, interfere with the performance of Licensor's service obligations or pose an immediate threat to the physical integrity of Licensor Facilities, Licensor may perform such work and/or take such action as it deems necessary without first giving written notice to Licensee. As soon as practicable thereafter, Licensor will advise Licensee of the work performed or the action taken. Licensee shall be responsible for all actual and documented costs incurred by Licensor in taking action pursuant to this Paragraph.

- 4.6 **Restoration of Licensor Service.** Licensor's service restoration requirements shall take precedence over any and all work operations of Licensee on Licensor's Poles.
- 4.7 **Effect of Failure to Exercise Access Rights.** If Licensee does not exercise any access right granted pursuant to this Agreement and/or applicable Permit(s) within ninety (90) calendar days of the effective date of such right and any extension thereof, Licensor may use the space scheduled for Licensee's Attachment(s) for its own needs or other Attaching Entities. In such instances, Licensor shall endeavor to make other space available to Licensee, upon written application per Article 6, as soon as reasonably possible and subject to all requirements of this Agreement, including the Make-Ready Work provisions. Licensee may obtain a refund on a *pro-rata* basis of any Attachment Fees it has paid in advance with respect to expired Permits.
- 4.8 **Interference Test Equipment.** To the extent Licensee furnishes cable television service it shall maintain test equipment to identify signal interference to its customers, and shall not identify Licensor as the source of such interference absent a test report verifying the source.
- 4.9 **Removal of Nonfunctional Attachments.** At its sole expense, Licensee shall remove any of its Attachments or any part thereof that becomes nonfunctional and no longer fit for service ("Nonfunctional Attachment") as provided in this Paragraph 4.9. A Nonfunctional Attachment that Licensee has failed to remove as required in this paragraph shall constitute an unauthorized Attachment and is subject to the Unauthorized Attachment fee specified in Appendix A, Item 3. Except as otherwise provided in this Agreement, Licensee shall remove Nonfunctional Attachments within ninety (90) days of the Attachment becoming nonfunctional, unless Licensee receives written notice from Licensor that removal is necessary to accommodate Licensor's or another Attaching Entity's use of the affected Pole(s), in which case Licensee shall remove the Nonfunctional Attachment within sixty (60) days of receiving the notice. Where Licensee has received a Permit to Overlash a Nonfunctional Attachment, such Nonfunctional Attachment may remain in place until Licensor notifies Licensee that removal is necessary to accommodate Licensor's or another Attaching Entity's use of the affected Pole(s). Licensee shall give Licensor notice of any Nonfunctional Attachments as provided in Article 15.

Article 5—Private and Regulatory Compliance

- 5.1 **Necessary Authorizations.** Licensee shall be responsible for obtaining from the appropriate public and/or private authority or other appropriate persons any required authorization to construct, operate and/or maintain its Communications Facilities on public and/or private property before it occupies any portion of Licensor's Poles. Licensee's obligations under this Article 5 include, but are not limited to, its obligation to obtain all necessary approvals to occupy public/private rights-of-way and to pay all costs associated therewith. Licensee shall defend, indemnify and hold harmless Licensor for all loss and expense, including reasonable attorney's fees, that Licensor may incur as a result of claims by governmental bodies, owners of private property, or other persons, that Licensee does not have sufficient rights or authority to attach Licensee's Communications Facilities on Licensor's Poles.
- 5.2 **Lawful Purpose and Use.** Licensee's Communications Facilities must at all times serve a lawful purpose, and the use of such Facilities must comply with all applicable federal, state and local laws.
- 5.3 **Forfeiture of Licensor's Rights.** No Permit granted under this Agreement shall extend to any Pole on which the Attachment of Licensee's Communications Facilities would result in a forfeiture of Licensor's rights. Any Permit, which on its face would cover Attachments that would result in forfeiture of Licensor's rights, is invalid. Further, if any of Licensee's existing Communications Facilities, whether installed pursuant to a valid Permit or not, would cause such forfeiture, Licensee shall promptly remove its Facilities upon receipt of written notice from Licensor. Licensor will perform such removal at Licensee's expense not sooner than the expiration of thirty (30) calendar days from Licensor's issuance of the written notice.
- 5.4 **Effect of Consent to Construction/Maintenance.** Consent by Licensor to the construction or maintenance of any Attachments by Licensee shall not be deemed consent, authorization or an acknowledgment that Licensee has the authority to construct or maintain any other such Attachments. It is Licensee's responsibility to obtain all necessary approvals for each Attachment from all appropriate parties or agencies.

Article 6—Permit Application Procedures

- 6.1 **Permit Required.** Licensee shall not install any Attachments on any Pole without first applying for and obtaining a Permit pursuant to the applicable requirements of Appendix B. Unless otherwise notified, Pre-existing Attachment(s) of Licensee as of

the effective date of this Agreement shall be grandfathered with respect to Permitting, but shall be subject to Attachment Fees in future billing periods. Licensee shall provide Licensor with a list, on the Licensor's provided spreadsheet, of all such pre-existing Attachments within eighteen (18) months of the effective date of this Agreement. All such pre-existing Attachments shall comply with the terms of this Agreement within eighteen (18) months of the effective date of this Agreement. Attachments to or rights to occupy Licensor Facilities not covered by this Agreement must be separately negotiated.

6.1.1 Service Drops. The Licensee will notify the Licensor within thirty (30) days of the attachment of a service drop where an existing permitted Attachment exists.

In the event that a service drop constitutes the initial Attachment to a given pole, Licensee will be required to follow the permitting process set forth in paragraph 6.1. In this case, the Licensee will be allowed 30 days after the Attachment is made to complete the permitting process.

6.2 Permits for Overlashing. As set out in Paragraph 2.11, except as provided for in paragraph 2.11.2, Permits are required for any Overlashing allowed under this Agreement. Licensee, Licensee's Affiliate or other third party, as applicable, shall pay any necessary Make-Ready Work costs to accommodate such Overlashing.

6.3 Professional Certification. Except as otherwise allowed under Appendix G, as part of the Permit application process and at Licensee's sole expense, a qualified and experienced professional engineer, or an employee or contractor of Licensee who has been approved by Licensor, must participate in the Pre-Construction Survey, conduct the Post-Construction Inspection and certify that Licensee's Communications Facilities can be and were installed on the identified Poles in compliance with the standards in Paragraph 4.1 and in accordance with the Permit. The professional engineer's, (or representative's as described above), qualifications must include experience performing such work, or substantially similar work, on electric transmission or distribution systems.

Licensor, at its discretion, may waive the requirements of this Paragraph 6.3, with respect to service drops.

- 6.4 **Licensors Review of Permit Application.** Upon receipt of a properly executed Application for Permit (Appendix C), which shall include the Pre-Construction Survey, certified per Paragraph 6.3 above, and detailed plans for the proposed Attachments in the form specified in Appendix D, Licensor will review the Permit Application within thirty (30) days, and discuss any issues with Licensee, including engineering or Make-Ready Work requirements associated with the Permit Application. In the event of unusually large requests, the Licensor may require up to thirty (30) additional days of processing time. Licensor acceptance of the submitted design documents does not relieve Licensee of full responsibility for any errors and/or omissions in the engineering analysis.
- 6.5 **Permit as Authorization to Attach.** After receipt of payment for any necessary Make-Ready Work, Licensor will sign and return the Permit Application, which shall serve as authorization for Licensee to make its Attachment(s).

Article 7—Make-Ready Work/Installation

- 7.1 **Estimate for Make-Ready Work.** In the event Licensor determines that it can accommodate Licensee's request for Attachment(s), including Overlapping of an existing Attachment, it will advise Licensee of any estimated Make-Ready Work charges necessary to accommodate the Attachment.
- 7.2 **Payment of Make-Ready Work.** Upon completion of the Make-Ready Work, Licensor shall invoice Licensee for Licensor's actual cost of such Make-Ready Work. Alternatively, Licensor, at its discretion, may require payment in advance for Make-Ready Work based upon the estimated cost of such work. In such case, upon completion Licensee shall pay Licensor's actual cost of Make-Ready Work. The costs of the work shall be itemized as per Paragraph 3.9 and tried up as per Paragraph 3.8.
- 7.3 **Who May Perform Make-Ready Work.** Make-Ready Work shall be performed only by Licensor and/or a contractor authorized by Licensor to perform such work. If Licensor cannot perform the Make-Ready Work to accommodate Licensee's Communications Facilities within forty-five (45) calendar days of Licensee's request for Attachments, Licensee may seek permission from Licensor for Licensee to employ a qualified contractor to perform such work.
- 7.4 **Scheduling of Make-Ready Work.** In performing all Make-Ready Work to accommodate Licensee's Communications Facilities, Licensor will endeavor to include such work in its normal work schedule. In the event Licensee requests that the Make-Ready Work be performed on a priority basis or outside of Licensor's normal work hours, Licensee agrees to pay any resulting increased

costs. Nothing herein shall be construed to require performance of Licensee's work before other scheduled work or Licensor service restoration.

7.5 Written Approval of Installation Plans Required. Except as allowed under Article 6, before making any Attachments to Licensor's Poles, including Overlashing of existing Attachments, the applicant must obtain Licensor's written approval of detailed plans for the Attachments. Such detailed plans shall accompany a Permit application as required under Paragraph 6.4.

7.6 Licensee's Installation/Removal/Maintenance Work.

7.6.1 All of Licensee's installation, removal and maintenance work shall be performed at Licensee's sole cost and expense, in a good and workmanlike manner, and must not adversely affect the structural integrity of Licensor's Poles or other Facilities or other Attaching Entity's facilities or equipment attached thereto. All such work is subject to the insurance requirements of Article 18.

7.6.2 All of Licensee's installation, removal and maintenance work performed on Licensor's Poles or in the vicinity of other Licensor Facilities, either by its employees or contractors, shall be in compliance with all applicable standards specified in Paragraph 4.1. Licensee shall assure that any person installing, maintaining, or removing its Communications Facilities is fully qualified and familiar with all Applicable Standards, the provisions of Article 17, and the Minimum Design Specifications contained in Appendix D.

Article 8—Transfers

8.1 Required Transfers of Licensee's Communications Facilities. If Licensor reasonably determines that a transfer of Licensee's Communications Facilities is necessary, Licensee agrees to allow such transfer. In such instances, Licensor will, at its option, either perform the transfer using its personnel, and/or contractors and/or require Licensee to perform such transfer at its own expense within thirty (30) calendar days after receiving notice from Licensor. If Licensee fails to transfer its Facilities within thirty (30) calendar days after receiving such notice from Licensor, Licensor shall have the right to transfer Licensee's Facilities using its personnel and/or contractors at Licensee's expense plus the fee specified in Appendix A. (4). Licensor shall not be liable for damage to Licensee's Facilities except to the extent provided in Paragraph 16.1. The written advance notification requirement of this Paragraph shall not apply to emergency situations, in which case Licensor shall provide such advance notice as is practical

given the urgency of the particular situation. Licensor shall then provide written notice of any such actions taken within ten (10) days of the occurrence.

Irrespective of who owns them, Licensee is responsible for the transfer of Facilities that are overlashed on to Licensee's Attachments. At the option of the Licensee, Licensor can be contracted to perform all such transfer work as part of the normal course of business. Licensor will bill Licensee at Licensor's cost. If Licensee chooses this option a separate agreement must be executed with the Licensor.

- 8.2 **Billing for Transfers Performed by Licensor.** If Licensor performs the transfer(s), Licensor will invoice the Licensee for actual costs per Paragraph 3.9. Licensee shall reimburse Licensor within thirty (30) calendar days of the billing date of the invoice.

Article 9—Pole Modifications And/Or Replacements

- 9.1 **Licensee's Action Requiring Modification/Replacement.** In the event that any Pole to which Licensee desires to make Attachment(s) is unable to support or accommodate the additional facilities in accordance with all Applicable Standards, Licensor will notify Licensee of the necessary Make-Ready Work, and associated costs, to provide an adequate Pole, including but not limited to replacement of the Pole, rearrangement or transfer of Licensor's Facilities and rearrangement or transfer of the Communications Facilities of any existing Licensees already on the Pole. If Licensee elects to go forward with the necessary changes, Licensee shall pay to Licensor and any other existing Licensees, the actual cost of the Make-Ready Work, performed by Licensor, per Paragraph 3.9 or performed by the other existing Licensees to accommodate the new Licensee. Licensor and existing attaching entities, at their discretion, may require advance payment.
- 9.2 **Treatment of Multiple Requests for Same Pole.** If Licensor receives Permit Applications for the same Pole from two or more prospective licensees within sixty (60) calendar days of the initial request, and accommodating their respective requests would require modification or replacement of the Pole, Licensor will allocate among such licensees the applicable costs associated with such modification or replacement.

- 9.3 **Guying.** The use of guying to accommodate Licensee's Attachments shall be provided by and at the expense of Licensee and to the satisfaction of Licensor as specified in Appendix D. Licensee shall not attach its guy wires to Licensor's anchors without prior written permission of Licensor. If permission is granted, make-ready charges may apply.
- 9.4 **Allocation of Costs.** The costs for any rearrangement or transfer of Licensee's Communications Facilities or the replacement of a Pole (including any related costs for tree cutting or trimming required to clear the new location of Licensor's cables or wires) shall be allocated to Licensor and/or Licensee and/or other Attaching Entity on the following basis:
- 9.4.1 If Licensor intends to modify or replace a Pole solely for its own requirements, it shall be responsible for the costs related to the modification/replacement of the Pole. Licensee, however, shall be responsible for all costs associated with the rearrangement or transfer of Licensee's Communications Facilities. Prior to making any such modification or replacement Licensor shall provide Licensee written notification of its intent in order to allow Licensee a reasonable opportunity to elect to modify or add to its existing Attachment. Should Licensee so elect, it must seek Licensor's written permission per this Agreement. The notification requirement of this Paragraph 9.4.1 shall not apply to routine maintenance or emergency situations. If Licensee elects to add to or modify its Communications Facilities, Licensee shall bear the total incremental costs incurred by Licensor in making the space on the Poles accessible to Licensee.
- 9.4.2 If the modification or the replacement of a Pole is the result of an additional Attachment or the modification of an existing Attachment sought by an Attaching Entity other than Licensor or Licensee, the Attaching Entity requesting the additional or modified Attachment shall bear the entire cost of the modification or Pole replacement, as well as the costs for rearranging or transferring Licensee's Communications Facilities. Licensee shall cooperate with such third-party Attaching Entity to determine the costs of moving Licensee's facilities.
- 9.4.3 If the Pole must be modified or replaced for other reasons unrelated to the use of the Pole by Attaching Entities (e.g., storm, accident, deterioration), Licensor shall pay the costs of such modification or replacement; provided, however, that Licensee shall be responsible for the costs of rearranging or transferring its Communications Facilities.

9.4.4 If the modification or replacement of a Pole is necessitated by the requirements of Licensee, Licensee shall be responsible for the costs related to the modification or replacement of the Pole and for the costs associated with the transfer or rearrangement of any other Attaching Entity's Communications Facilities. Licensee shall submit to Licensor evidence, in writing, that it has made arrangements to reimburse all affected Attaching Entities for the cost to transfer or rearrange such Entities' Facilities at the time Licensee submits a Permit Application to Licensor. Licensor shall not be obligated in any way to enforce or administer Licensee's responsibility for the costs associated with the transfer or rearrangement of another Attaching Entity's Facilities pursuant to this Paragraph 9.4.4.

9.5 **Licensor Not Required to Relocate.** No provision of this Agreement shall be construed to require Licensor to relocate its Attachments or modify/replace its Poles for the benefit of Licensee, provided, however, any denial by Licensor for modification of the pole is based on nondiscriminatory standards of general applicability.

Article 10—Abandonment or Removal of Licensor Facilities

10.1 **Notice of Abandonment or Removal of Licensor Facilities.** If Licensor desires at any time to abandon, remove or underground any Licensor Facilities to which Licensee's Communications Facilities are attached, it shall give Licensee notice in writing to that effect at least ninety (90) calendar days prior to the date on which it intends to abandon or remove such Licensor's Facilities. Notice may be limited to sixty (60) calendar days if Licensor is required to remove or abandon its Licensor Facilities, as the result of the action of a third party and the greater notice period is not practical. Such notice shall indicate whether Licensor is offering Licensee an option to purchase the Pole(s). If, following the expiration of the notice period, Licensee has not yet removed and/or transferred all of its Communications Facilities therefrom and has not entered into an agreement to purchase Licensor's Facilities pursuant to Paragraph 10.2, Licensor shall have the right, subject to any applicable laws and regulations, to have Licensee's Communications Facilities removed and/or transferred from the Pole at Licensee's expense. Licensor shall give Licensee prior written notice of any such removal or transfer of Licensee's Facilities.

10.2 **Option to Purchase Abandoned Poles.** Should Licensor desire to abandon any Pole, Licensor, in its sole discretion, may grant Licensee the option of purchasing

such Pole at a rate, which is the value in place, at that time, of such abandoned Pole. Licensee must notify Licensor in writing within thirty (30) calendar days of the date of Licensor's notice of abandonment that Licensee desires to purchase the abandoned Pole. Thereafter, Licensee must also secure and deliver proof of all necessary governmental approvals and easements allowing Licensee to independently own and access the Pole within forty-five (45) calendar days. Should Licensee fail to secure the necessary governmental approvals, or should Licensor and Licensee fail to enter into an agreement for Licensee to purchase the Pole prior to the end of the forty-five (45) calendar days, Licensee must remove its Attachments as required under Paragraph 10.1. Licensor is under no obligation to sell Licensee Poles that it intends to remove or abandon.

- 10.3 **Underground Relocation.** If Licensor moves any portion of its aerial system underground, Licensee shall remove its Communications Facilities from any affected Poles within ninety (90) calendar days of receipt of notice from Licensor and either relocate its affected Facilities underground with Licensor or find other means to accommodate its Facilities. Licensee's failure to remove its Facilities as required under this Paragraph 10.3 shall subject Licensee to the failure to timely transfer, abandon or remove facilities fee provisions of Appendix A.

Article 11—Removal of Licensee's Facilities

Removal on Expiration/Termination. At the expiration or other termination of this License Agreement or individual Permit(s), Licensee shall remove its Communications Facilities from the affected Poles at its own expense. If Licensee fails to remove such facilities within sixty (60) calendar days of expiration or termination or some greater period as allowed by Licensor, Licensor shall have the right to have such facilities removed at Licensee's expense.

Article 12—Termination of Permit

- 12.1 **Automatic Termination of Permit.** Any Permit issued pursuant to this Agreement shall automatically terminate when Licensee ceases to have authority to construct and operate its Communications Facilities on public or private property at the location of the particular Pole(s) covered by the Permit. Notwithstanding the foregoing, to the extent Licensee is pursuing a challenge of the revocation of any such permission, Licensee may remain on the particular Pole(s) until such time as all appeals and remedies are exhausted.

- 12.2 **Surrender of Permit.** Licensee may at any time surrender any Permit for Attachment and remove its Communications Facilities from the affected Pole(s) provided, however, that before commencing any such removal Licensee must obtain Licensor's acceptance of Licensee's written notification of removal, including the name of the party performing such work and the proposed date(s) and time(s) during which such work will be completed. All such work is subject to the insurance requirements of Article 18. No refund of any fees or costs will be made upon removal. If Licensee surrenders such Permit pursuant to the provisions of this Article, but fails to remove its Attachments from Licensor's Facilities within the time frame set forth in the approved plan above, Licensor shall have the right to remove Licensee's Attachments at Licensee's expense.

Article 13—Inspection of Licensee's Facilities

- 13.1 **Inspections.** Licensor may conduct an inventory and inspection of Attachments at any time. Licensee shall correct all Attachments that are not found to be in compliance with Applicable Standards within sixty (60) calendar days of notification. Except as provided for in Article 6.1, if it is found that Licensee has made an Attachment without a Permit, Licensee shall pay a fee as specified in Appendix A, Item 3 in addition to applicable Permit and Make-Ready charges. If it is found that five percent (5%) or more of Licensee's Attachments are either in non-compliance or not permitted, Licensee shall pay its *pro-rata* share of the costs of the inspection.
- 13.2 **Notice.** Licensor will provide reasonable notice of such inspections to the Licensee, except in those instances where safety considerations justify the need for such inspection without the delay of waiting until notice has been received. When notified, Licensee will notify Licensor if it wishes to participate in the inspection.
- 13.3 **No Liability.** Inspections performed under this Article 13, or the failure to do so, shall not operate to impose upon Licensor any liability of any kind whatsoever or relieve Licensee of any responsibility, obligations or liability whether assumed under this Agreement or otherwise existing.
- 13.4 **Attachment Records.** Notwithstanding the above inspection provisions, Licensee is obligated to furnish Licensor on an annual basis an up-to-date map depicting the locations of its Attachments in an electronic format specified by Licensor. If a map is not available, the Licensee will provide a list in an electronic format specified by the Licensor.

Article 14—Unauthorized Occupancy or Access

- 14.1 **Unauthorized Occupancy or Access Fee.** If any of Licensee's Attachments are found occupying any Pole for which no Permit has been issued, Licensor, without prejudice to its other rights or remedies under this Agreement, may assess an Unauthorized Access Fee as specified in Appendix A, Item 3. In the event Licensee fails to pay such Fee within thirty (30) calendar days of the billing date of the invoice, Licensor has the right to remove such Communications Facilities at Licensee's expense.
- 14.2 **No Ratification of Unlicensed Use.** No act or failure to act by Licensor with regard to any unlicensed use shall be deemed as ratification of the unlicensed use and if any Permit should be subsequently issued, such Permit shall not operate retroactively or constitute a waiver by Licensor of any of its rights or privileges under this Agreement or otherwise; provided, however, that Licensee shall be subject to all liabilities, obligations and responsibilities of this Agreement in regards to the unauthorized use from its inception.

Article 15—Reporting Requirements

- 15.1 Upon receipt of request by the Licensor, but not more than annually, the Licensee shall report attachments per Article 13.4.

Article 16—Liability and Indemnification

- 16.1 **Liability.** Licensor reserves to itself the right to maintain and operate its Poles in such manner as will best enable it to fulfill its statutory service requirements. Licensee agrees to use Licensor's Poles at Licensee's sole risk. Notwithstanding the foregoing, Licensor shall exercise reasonable precaution to avoid damaging Licensee's Communications Facilities and shall report to Licensee the occurrence of any such damage caused by its employees, agents or contractors. Subject to Paragraph 16.5, Licensor agrees to reimburse Licensee for all reasonable costs incurred by Licensee for the physical repair of such facilities damaged by the negligence or willful misconduct of Licensor, provided, however, that the aggregate liability of Licensor, to Licensee, in any fiscal year, shall not exceed the amount of the total Annual Attachment Fees paid by Licensee to Licensor for that year as calculated based on the number of Attachments under Permit at the time of the damage per Appendix A, Item 1.

16.2 Indemnification. Licensee, and any agent, contractor or subcontractor of Licensee, shall defend, indemnify and hold harmless Licensor and its officials, officers, board members, council members, commissioners, representatives, employees, agents, and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, payments (including payments made by Licensor under any Workers' Compensation Laws or under any plan for employees' disability and death benefits), and expenses (including reasonable attorney's fees of Licensor and all other costs and expenses of litigation) ("Covered Claims") arising in any way, including any act, omission, failure, negligence or willful misconduct, in connection with the construction, maintenance, repair, presence, use, relocation, transfer, removal or operation by Licensee, or by Licensee's officers, directors, employees, agents or contractors, of Licensee's Communications Facilities, except to the extent of Licensor's negligence or willful misconduct giving rise to such Covered Claims. Such Covered Claims include, but are not limited to, the following:

16.2.1 Intellectual property infringement, libel and slander, trespass, unauthorized use of television or radio broadcast programs and other program material, and infringement of patents;

16.2.2 Cost of work performed by Licensor that was necessitated by Licensee's failure, or the failure of Licensee's officers, directors, employees, agents or contractors, to install, maintain, use, transfer or remove Licensee's Communications Facilities in accordance with the requirements and specifications of this Agreement, or from any other work this Agreement authorizes Licensor to perform on Licensee's behalf;

16.2.3 Damage to property, injury to or death of any person arising out of the performance or nonperformance of any work or obligation undertaken by Licensee, or Licensee's officers, directors, employees, agents or contractors, pursuant to this Agreement;

16.2.4 Liabilities incurred as a result of Licensee's violation, or a violation by Licensee's officers, directors, employees, agents or contractors, of any law, rule, or regulation of the United States, State of Washington or any other governmental entity or administrative agency.

16.3 Procedure for Indemnification.

16.3.1 Licensor shall give prompt notice to Licensee of any claim or threatened claim, specifying the factual basis for such claim and the amount of the claim. If the claim relates to an action, suit or proceeding filed by a third

party against Licensor, Licensor shall give the notice to Licensee no later than ten (10) calendar days after Licensor receives written notice of the action, suit or proceeding.

16.3.2 Licensor's failure to give the required notice will not relieve Licensee from its obligation to indemnify Licensor unless Licensee is materially prejudiced by such failure.

16.3.3 Licensee will have the right at any time, by notice to Licensor, to participate in or assume control of the defense of the claim with counsel of its choice. Licensor agrees to cooperate fully with Licensee. If Licensee so assumes control of the defense of any third-party claim, Licensor shall have the right to participate in the defense at its own expense. If Licensee does not so assume control or otherwise participate in the defense of any third-party claim, Licensee shall be bound by the results obtained by Licensor with respect to the claim.

16.3.4 If Licensee assumes the defense of a third-party claim as described above, then in no event will Licensor admit any liability with respect to, or settle, compromise or discharge, any third-party claim without Licensee's prior written consent, and Licensor will agree to any settlement, compromise or discharge of any third-party claim which Licensee may recommend which releases Licensor completely from such claim.

16.4 **Environmental Hazards.** Licensee represents and warrants that its use of Licensor's Poles will not generate any Hazardous Substances, that it will not store or dispose on or about Licensor's Poles or transport to Licensor's Poles any hazardous substances and that Licensee's Communications Facilities will not constitute or contain and will not generate any hazardous substance in violation of federal, state or local law now or hereafter in effect including any amendments. "Hazardous Substance" shall be interpreted broadly to mean any substance or material designated or defined as hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, dangerous radio frequency radiation, or other similar terms by any federal, state, or local laws, regulations or rules now or hereafter in effect including any amendments. Licensee further represents and warrants that in the event of breakage, leakage, incineration or other disaster, its Communications Facilities would not release any Hazardous Substances. Licensee and its agents, contractors and subcontractors shall defend, indemnify and hold harmless Licensor and its respective officials, officers, board members, council members, commissioners, representatives, employees, agents and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, punitive damages, expenses (including reasonable

attorney's fees and all other costs and expenses of litigation) arising from or due to the release, threatened release, storage or discovery of any Hazardous Substances on, under or adjacent to Licensor's Poles attributable to Licensee's use of Licensor's Poles.

Should Licensor's Poles be declared to contain Hazardous Substances, Licensor, shall be responsible for the disposal of its pole. Provided, however, if the source or presence of the Hazardous Substance is solely attributable to particular parties, such costs shall be borne solely by those parties. Notwithstanding the above, Licensor agrees to defend, indemnify and hold harmless Licensee for any claims against Licensee related to Hazardous Substances or Conditions to the extent caused or created by Licensor.

- 16.5 **Municipal Liability Limits.** No provision of this Agreement is intended, or shall be construed, to be a waiver for any purpose by Licensor of any applicable State limits on municipal liability. No indemnification provision contained in this Agreement under which Licensee indemnifies Licensor shall be construed in any way to limit any other indemnification provision contained in this Agreement.
- 16.6 **Attorney's Fees.** If Licensor brings a successful action in a court of competent jurisdiction to enforce this Agreement, Licensee shall pay Licensor's reasonable attorney's fees.

Article 17—Duties, Responsibilities, And Exculpation

- 17.1 **Duty to Inspect.** Licensee acknowledges and agrees that Licensor does not warrant the condition or safety of Licensor's Facilities, or the premises surrounding the Facilities, and Licensee further acknowledges and agrees that it has an obligation to inspect Licensor's Poles and/or premises surrounding the Poles, prior to commencing any work on Licensor's Poles or entering the premises surrounding such Poles. Licensee's responsibility is limited only to the extent necessary to perform Licensee's work. Any obligation of Licensor with respect to the condition or safety of its facilities separate from this Agreement shall remain solely the obligation of the Licensor.
- 17.2 **Knowledge of Work Conditions.** By executing this Agreement, Licensee warrants that it has acquainted, or will fully acquaint, itself and its employees and/or contractors and agents with the conditions relating to the work that Licensee will undertake under this Agreement and that it fully understands or will acquaint itself with the facilities, difficulties and restrictions attending the execution of such work.

17.3 DISCLAIMER. LICENSOR MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH REGARD TO LICENSOR'S POLES, ALL OF WHICH ARE HEREBY DISCLAIMED, AND LICENSOR MAKES NO OTHER EXPRESS OR IMPLIED WARRANTIES, EXCEPT TO THE EXTENT EXPRESSLY AND UNAMBIGUOUSLY SET FORTH IN THIS AGREEMENT. LICENSOR EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

17.4 Duty of Competent Supervision and Performance. The parties further understand and agree that in the performance of work under this Agreement, Licensee and its agents, employees, contractors and subcontractors will work near electrically energized lines, transformers or other Licensor Facilities, and it is the intention that energy therein will not be interrupted during the continuance of this Agreement, except in an emergency endangering life, grave personal injury or property. Licensee shall ensure that its employees, agents, contractors and subcontractors have the necessary qualifications, skill, knowledge, training and experience to protect themselves, their fellow employees, employees of Licensor and the general public; from harm or injury while performing work permitted pursuant to this Agreement. In addition, Licensee shall furnish its employees, agents, contractors and subcontractors competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. Licensee agrees that in emergency situations in which it may be necessary to de-energize any part of Licensor's equipment, Licensee shall ensure that work is suspended until the equipment has been de-energized and that no such work is conducted unless and until the equipment is made safe.

17.5 Requests to De-energize. In the event Licensor de-energizes any equipment or line at Licensee's request and for its benefit and convenience in performing a particular segment of any work, Licensee shall reimburse Licensor in full for all costs and expenses incurred, in accordance with Paragraph 3.9, in order to comply with Licensee's request. Before Licensor de-energizes any equipment or line, it shall provide, upon request, an estimate of all costs and expenses to be incurred in accommodating Licensee's request.

17.6 Interruption of Service. In the event that Licensee causes an interruption of service by damaging or interfering with any equipment of Licensor, Licensee at its expense shall immediately do all things reasonable to avoid injury or damages, direct and incidental, resulting therefrom and shall notify Licensor immediately.

17.7 Duty to Inform. Licensee further warrants that it understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM

ELECTROCUTION) inherent in the work necessary to make installations on Licensor's Poles by Licensee's employees, agents, contractors or subcontractors, and accepts as its duty and sole responsibility to notify and inform Licensee's employees, agents, contractors or subcontractors of such dangers, and to keep them informed regarding same.

Article 18—Insurance

18.1 **Policies Required.** At all times during the term of this Agreement, Licensee shall keep in force and effect all insurance policies as described below:

18.1.1 **Workers' Compensation and Employers' Liability Insurance.** Statutory workers' compensation benefits and employers' liability insurance with a limit of liability no less than that required by Washington State law at the time of the application of this provision for each accident. Licensee shall require subcontractors and others not protected under its insurance to obtain and maintain such insurance.

18.1.2 **Commercial General Liability Insurance.** Policy will be written to provide coverage for, but not limited to, the following: premises and operations, products and completed operations, personal injury, blanket contractual coverage, broad form property damage, independent contractor's coverage with Limits of liability not less than \$2,000,000 general aggregate, \$2,000,000 products/completed operations aggregate, \$2,000,000 personal injury, \$2,000,000 each occurrence.

18.1.3 **Automobile Liability Insurance.** Business automobile policy covering all owned, hired and nonowned private passenger autos and commercial vehicles used in connection with work under this Agreement. Limits of liability not less than \$1,000,000 each occurrence, \$1,000,000 aggregate.

18.1.4 **Umbrella Liability Insurance.** Coverage is to be in excess of the sum employers' liability, commercial general liability, and automobile liability insurance required above. Limits of liability not less than \$4,000,000 each occurrence, \$4,000,000 aggregate.

18.1.5 **Property Insurance.** Each party will be responsible for maintaining property insurance on its own facilities, buildings and other improvements, including all equipment, fixtures, and Licensor structures, fencing or support systems that may be placed on, within or around Licensor Facilities to fully protect against hazards of fire, vandalism and malicious mischief, and such other perils as are covered by policies of insurance commonly

referred to and known as "extended coverage" insurance or self-insure such exposures.

- 18.2 **Qualification; Priority; Contractors' Coverage.** The insurer must be authorized to do business under the laws of the State of Washington and have an "A" or better rating in Best's Guide. Such insurance will be primary. All contractors and all of their subcontractors who perform work on behalf of Licensee shall carry, in full force and effect, workers' compensation and employers' liability, comprehensive general liability and automobile liability insurance coverages of the type that Licensee is required to obtain under this Article 18 with the same limits.
- 18.3 **Certificate of Insurance; Other Requirements.** Prior to the execution of this Agreement and prior to each insurance policy expiration date during the term of this Agreement, Licensee will furnish Licensor with a certificate of insurance ("Certificate") and, upon request, copies of the required insurance policies. The Certificate shall reference this Agreement and workers' compensation and property insurance waivers of subrogation required by this Agreement. Licensor shall be given thirty (30) calendar days advance notice of cancellation or nonrenewal of insurance during the term of this Agreement. Licensor, its council members, board members, commissioners, agencies, officers, officials, employees and representatives (collectively, "Additional Insureds") shall be named as Additional Insureds under all of the policies, except workers' compensation, which shall be so stated on the Certificate of Insurance. All policies, other than workers' compensation, shall be written on an occurrence and not on a claims-made basis. All policies may be written with deductibles, not to exceed \$100,000, or such greater amount as expressly allowed in writing by Licensor. Licensee shall defend, indemnify and hold harmless Licensor and Additional Insureds from and against payment of any deductible and payment of any premium on any policy required under this Article. Licensee shall obtain Certificates from its agents, contractors and their subcontractors and provide a copy of such Certificates to Licensor upon request.
- 18.4 **Limits.** The limits of liability set out in this Article 18 may be increased or decreased by mutual consent of the parties, which consent will not be unreasonably withheld by either party, in the event of any factors or occurrences, including substantial increases in the level of jury verdicts or judgments or the passage of state, federal or other governmental compensation plans, or laws which would materially increase or decrease Licensee's exposure to risk.
- 18.5 **Prohibited Exclusions.** No policies of insurance required to be obtained by Licensee or its contractors or subcontractors shall contain provisions (1) that exclude coverage of liability assumed by this Agreement with Licensor except as

to infringement of patents or copyrights or for libel and slander in program material; (2) that exclude coverage of liability arising from excavating, collapse, or underground work, (3) that exclude coverage for injuries to Licensor's employees or agents directly caused by the negligence of Licensee, or (4) that exclude coverage of liability for injuries or damages caused by Licensee's contractors or the contractors' employees, or agents. This list of prohibited provisions shall not be interpreted as exclusive.

- 18.6 **Deductible/Self-insurance Retention Amounts.** Licensee shall be fully responsible for any deductible or self-insured retention amounts contained in its insurance program or for any deficiencies in the amounts of insurance maintained.

Article 19—Authorization Not Exclusive

Licensor shall have the right to grant, renew and extend rights and privileges to others not party to this Agreement by contract or otherwise, to use Licensor Facilities covered by this Agreement. Such rights shall not interfere with the rights granted to Licensee by the specific Permits issued pursuant to this Agreement.

Article 20—Assignment

- 20.1 **Limitations on Assignment.** Licensee shall not assign its rights or obligations under this Agreement, nor any part of such rights or obligations, without the prior written consent of Licensor, which consent shall not be unreasonably withheld. Licensee shall furnish Licensor with prior written notice of the transfer or assignment, together with the name and address of the transferee or assignee. It shall be unreasonable for Licensor to withhold consent without cause to an assignment of all of Licensee's interests in this Agreement to its Affiliate.
- 20.2 **Obligations of Assignee/Transferee and Licensee.** No assignment or transfer under this Article 20 shall be allowed until the assignee or transferee becomes a signatory to this Agreement and assumes all obligations of Licensee arising under this Agreement
- 20.3 **Sub-licensing.** Without Licensor's prior written consent, Licensee shall not sub-license or lease to any third party, including but not limited to allowing third parties to place Attachments on Licensor's Facilities, including Overlashing, or to place Attachments for the benefit of such third parties on Licensor's Poles. Any such action shall constitute a material breach of this Agreement. The use of Licensee's Communications Facilities by third parties (including but not limited

to leases of dark fiber) that involves no additional Attachment or Overlapping is not subject to this Paragraph 20.3.

Article 21—Failure to Enforce

Failure of Licensor or Licensee to take action to enforce compliance with any of the terms or conditions of this Agreement or to give notice or declare this Agreement or any authorization granted hereunder terminated shall not constitute a waiver or relinquishment of any term or condition of this Agreement, but the same shall be and remain at all times in full force and effect until terminated, in accordance with this Agreement.

Article 22—Termination of Agreement

22.1 Notwithstanding Licensor's rights under Article 12, Licensor shall have the right, pursuant to the procedure set out in Paragraph 22.2, to terminate this entire Agreement, or any Permit issued hereunder, whenever Licensee is in default of any term or condition of this Agreement, including but not limited to the following circumstances:

22.1.1 Construction, operation or maintenance of Licensee's Communications Facilities in violation of law or in aid of any unlawful act or undertaking; or

22.1.2 Construction, operation or maintenance of Licensee's Communications Facilities after any authorization required of Licensee has lawfully been denied or revoked by any governmental or private authority; subject to Paragraph 12.1; or violation of any other agreement with Licensor; or

22.1.3 Construction, operation or maintenance of Licensee's Communications Facilities without the insurance coverage required under Article 18.

22.2 Licensor will notify Licensee in writing within fifteen (15) calendar days, or as soon as reasonably practicable, of any condition(s) applicable to Paragraph 22.1 above. Licensee shall take immediate corrective action to eliminate any such condition(s) within fifteen (15) calendar days, or such longer period mutually agreed to by the parties, and shall confirm in writing to Licensor that the cited condition(s) has (have) ceased or been corrected. If Licensee fails to discontinue or correct such condition(s) and/or fails to give the required confirmation, Licensor may immediately terminate this Agreement or any Permit(s). In the event of termination of this Agreement or any of Licensee's rights, privileges or authorizations hereunder, Licensor may seek removal of Licensee's Communications Facilities pursuant to the terms of Article 11, provided, that Licensee shall be liable for and pay all fees and charges pursuant to terms of this

Agreement to Licensor until Licensee's Communications Facilities are actually removed.

Article 23—Term of Agreement

- 23.1 This Agreement shall become effective upon its execution and, if not terminated in accordance with other provisions of this Agreement, shall continue in effect for a term of five (5) years. Either party may terminate this Agreement at the end of the initial five (5) year term by giving to the other party written notice of an intention to terminate this Agreement at least one hundred eighty (180) calendar days prior to the end of the term. If no such notice is given, this Agreement shall automatically be extended for an additional five (5) year term. Either party may terminate this Agreement at the end of the second five (5) year term by giving to the other party written notice of an intention to terminate this Agreement at least one hundred eighty (180) calendar days prior to the end of the second term. Upon failure to give such notice, this Agreement shall automatically continue in force until terminated by either party after one hundred eighty (180) calendar days written notice.
- 23.2 Even after the termination of this Agreement, Licensee's responsibility and indemnity obligations shall continue with respect to any claims or demands related to this Agreement.

Article 24—Amending Agreement

Notwithstanding other provisions of this Agreement, the terms and conditions of this Agreement shall not be amended, changed or altered except in writing and with approval by authorized representatives of both parties.

Article 25—Notices

- 25.1 Wherever in this Agreement notice is required to be given by either party to the other, such notice shall be in writing and shall be effective when mailed by certified mail, return receipt requested, with postage prepaid and, except where specifically provided for elsewhere, properly addressed as follows:

If to Licensor, at: **Public Utility District No. 2 of Pacific County**
405 Duryea Street
P.O. Box 472
Raymond, WA 98577

If to Licensee, at: **Comcast Cable Communications, Inc.**
410 Valley Avenue Northwest Suite 9
Payallup, WA 98371

or to such other address as either party, from time to time, may give the other party in writing.

- 25.2 Licensee shall maintain a staffed 24-hour emergency telephone number where Licensor can contact Licensee to report damage to Licensee's facilities or other situations requiring immediate communications between the parties. Such contact person shall be qualified and able to respond to Licensor's concerns and requests. Failure to maintain an emergency contact shall subject Licensee to a fee of \$100 per incident, and shall eliminate Licensor's liability to Licensee for any actions that Licensor deems reasonably necessary given the specific circumstances.

Article 26—Entire Agreement

This Agreement supersedes all previous agreements, whether written or oral, between Licensor and Licensee for placement and maintenance of Licensee's Communications Facilities on Licensor's Poles within the geographical service area covered by this Agreement; and there are no other provisions, terms or conditions to this Agreement except as expressed herein. Except as provided for in Article 4.1, any Attachments existing under prior authorization shall continue in effect, provided they meet the terms of this Agreement.

Article 27—Severability

If any provision or portion thereof of this Agreement is or becomes invalid under any applicable statute or rule of law, and such invalidity does not materially alter the essence of this Agreement to either party, such provision shall not render unenforceable this entire Agreement but rather it is the intent of the parties that this Agreement be administered as if not containing the invalid provision.

Article 28—Governing Law

The validity, performance and all matters relating to the effect of this Agreement and any amendment hereto shall be governed by the laws (without reference to choice of law) of the State of Washington.

Article 29—Incorporation of Recitals and Appendices

The recitals stated above and all appendices to this Agreement are incorporated into and constitute part of this Agreement.

Article 30—Performance Bond

On execution of this Agreement, Licensee shall provide to Licensor a performance bond in an amount that is equal to Forty Dollars (\$40.00) per Licensee Pole Attachment or Ten Thousand Dollars (\$10,000.00), whichever is greater. The required bond amount may be adjusted periodically to account for additions or reductions in the total number of Licensee's Pole Attachments. The bond shall be with an entity and in a form acceptable to Licensor. The purpose of the bond is to ensure Licensee's performance of all of its obligations under this Agreement and for the payment by Licensee of any claims, liens, taxes, liquidated damages, penalties and fees due to Licensor which arise by reason of the construction, operation, maintenance or removal of Licensee's Communications Facilities on or about Licensor's Poles. The Licensor at its sole discretion, may waive the requirement of a performance bond if the proposed Licensee, or its predecessor, is a regionally or nationally recognized communications provider having formally been in existence for a minimum of ten years and can demonstrate financial responsibility.

Article 31—Force Majeure

31.1 In the event that either Licensor or Licensee is prevented or delayed from fulfilling any term or provision of this Agreement by reason of fire, flood, earthquake or like acts of nature, wars, revolution, civil commotion, explosion, acts of terrorism, embargo, acts of the government in its sovereign capacity, material changes of laws or regulations, labor difficulties, including without limitation, strikes, slowdowns, picketing or boycotts, unavailability of equipment of vendor, or any other such cause not attributable to the negligence or fault of the party delayed in performing the acts required by the Agreement, then performance of such acts shall be excused for the period of the unavoidable delay, and any such party shall endeavor to remove or overcome such inability as soon as reasonably possible. Licensee shall not be responsible for any charges associated with Licensor's Facilities for any periods that such facilities are unusable.

31.2 Licensor shall not impose any charges on Licensee stemming solely from Licensee's inability to perform required acts during a period of unavoidable delay as described in Paragraph 31.1, provided that Licensee present Licensor

with a written description of such *force majeure* within a reasonable time after occurrence of the event or cause relied on, and further provided that this provision shall not operate to excuse Licensee from the timely payment of any fees or charges due Licensor under this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate on the day and year first written above.

(LICENSOR)

(LICENSEE)



BY: _____

BY: _____

Title: _____

Title: _____

LICENSOR

STATE OF WASHINGTON

: ss

County of PACIFIC

I, the undersigned, a Notary Public in and for the State of WASHINGTON hereby certify that on the ____ day of _____, 2____, personally appeared before me [NAME] _____, [TITLE] _____ to me known to be the individual described in and who executed the foregoing instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year above written.

Notary Public in and for the
State of Washington residing at

LICENSEE

STATE OF _____

: ss

County of _____

I, the undersigned, a Notary Public in and for the State of _____, hereby certify that on the _____ day of _____, 2____, personally appeared before me [NAME] _____; [TITLE] _____ to me known to be the individual described in and who executed the foregoing instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year above written.

Notary Public in and for the
State of _____, residing at

APPENDIX A—FEES AND CHARGES

Pole Attachment Fees and Charges

1. Annual Pole Attachment Fee: (fee will be charged on a per pole basis per Article 3.3)

Effective 01/01/2007: \$13.25 per attachment per year.

Effective 01/01/2008: \$19.70 per attachment per year.

Adjustment of Annual Pole Attachment Fee:

The fees stated in this section shall remain in effect through 12/31/2011. After that date and by giving six (6) months notice to the Licensee, Licensor may from time to time adjust the rate specified in this section, effective as of the date on which the annual payment hereinabove provided for is to be computed next, following the expiration of the six-month notice period. If such changed rate is not acceptable to the licensee, licensee may terminate this agreement subject to terms provided for in Article 23 of this agreement.

2. Non-Recurring Fees:

- Permit Application Fee\$100.00 per Permit Application
(20 Poles)
- Permit Application Fee\$250.00 per Permit Application
(21 or more Poles)
- Make Ready Work Charges.....See Article 3 of Agreement
- Miscellaneous ChargesSee Article 3 of Agreement
- Inspection Fees.....See Article 3 of Agreement

NOTE: Permit Application fees may be adjusted periodically, but not more often than annually, to reflect increases in operating costs.

3. Unauthorized Attachment Fee:

- 3 x annual attachment fee, per occurrence.

4. Failure To Timely Transfer, Abandon or Remove Facilities Fee:

- 1/5 annual attachment fee per day, per pole, first 30 days;
- Annual attachment fee per day, per pole, second 30 days and thereafter.

APPENDIX B—POLE ATTACHMENT PERMIT APPLICATION PROCESS

The following procedure is to be followed by each Licensee seeking to make new Attachments on Licensor's Poles. Note that no entity may make any Attachments to Licensor's Poles without having first entered into a binding Pole Attachment Licensing Agreement.

1. Licensee shall submit a completed Permit Application (Appendix C) that includes: route map, information required in Appendix F, installation plans and recommendations on Make-Ready Work. Licensee shall prepare the Permit Application in adherence with the Applicable Standards (Section 1.2 of Agreement) and specifications (Appendix D).
2. The Licensor will review the completed permit application and discuss any issues with the Licensee. Said review may involve an onsite inspection of proposed attachment(s) with Licensee's professional engineer or Licensor approved Licensee employee or contractor.
3. Upon receipt of written authorization, Licensor will proceed with Make-Ready Work according to the specific agreed-upon installation plans and the terms of the Agreement, including payment for the Make-Ready Work charges as set out by Licensor and agreed to by the Licensee.
4. Upon completion of the Make-Ready Work, the Licensor will sign and return the Application for Permit authorizing the Licensee to make its Attachment(s) in accordance with agreed-upon installation plans.
5. The Licensee's professional engineer, Licensor-approved employee or contractor shall submit written certification that he/she has completed the Post-Construction Inspection and that the installation was done in accordance with the provisions of the Permit. The Post-Construction Inspection shall be submitted within thirty (30) calendar days after installation is complete.

APPENDIX C—APPLICATION FOR PERMIT

Application Date: ___/___/___

Permit Application Fee: \$ _____

To:

Public Utility District No. 2 of Pacific County
405 Duryea \ PO Box 472
Raymond, WA 98577

Desire to: _____ Attach to Utility Pole(s) _____ Remove Attachment from Utility Pole(s)

Permit No. _____ Superseded Permit No. _____

Number of Poles this permit _____ Sheet 1 of _____

Licensee Name: _____

Address: _____

Contact Person: _____ Phone _____

Title: _____

Utility Contact Person: _____ Phone _____

Title: _____

Narrative Description of proposed activity: _____

In accordance with the terms and conditions of the Pole Attachment Licensing Agreement dated _____, application is hereby made for a Permit to attach to and/or vacate Pole(s) in the locations detailed on the attached Route Map(s). Also, attached is documentation as required by Appendix F of the Agreement. If applicable, the engineer's name, this State's registration number and phone number are:

Name: _____ Phone _____

Registration # _____

Permission is hereby granted to Licensee to attach and/or vacate poles listed on the attached Field Data Summary Sheets, subject to payment of the necessary Make-Ready Work charges as set out by Utility and agreed to by the Licensee.

SUBMITTED:

APPROVED:

Licensee _____

Utility _____

By _____

By _____

Title _____

Title _____

Date _____

Date _____

APPENDIX D—SPECIFICATIONS FOR LICENSEE'S ATTACHMENTS TO LICENSOR POLES

Licensee, when making Attachments to Licensor Poles, will adhere to the following engineering and construction practices.

A. All Attachments shall be made in accordance with the Applicable Standards as defined in Paragraph 1.2 of this Agreement.

B. Clearances

1. **Attachment and Cable Clearances:** Licensee's Attachments on Licensor Poles, including metal attachment clamps and bolts, metal cross-arm supports, bolts and other equipment, must be attached so as to maintain the minimum separations specified in the National Electrical Safety Code ("NESC") and in drawings and specifications Licensor may from time to time furnish Licensee. (See Drawings A-01 to A-08.)
2. **Service Drop Clearance:** The parallel minimum separation between Licensor's service drops and communications service drops shall be twelve (12) inches, and the crossover separation between the drops shall be twenty-four (24) inches. (See Drawings A-05 and A-06.)
3. **Sag and Mid-Span Clearances:** Licensee will be particularly careful to leave proper sag in its lines and cables and shall observe the established sag of power line conductors and other cables so that minimum clearances are (a) achieved at poles located on both ends of the span; and (b) retained throughout the span. At mid-span, a minimum of twelve (12) inches of separation must be maintained between any other cables. At the pole support, a six (6) inch separation must be maintained between Licensee and any other communications connection/attachment. (See Drawing A-06.)
4. **Vertical Risers:** All Risers shall be placed on the quarter faces of the Pole and must be installed in conduit attached to the Pole with stand-off brackets. A two (2) inch clearance in any direction from cable, bolts, clamps, metal supports and other equipment shall be maintained. (See Drawing A-02.)

5. **Climbing Space:** A clear Climbing Space must be maintained at all times on the face of the Pole. All Attachments must be placed so as to allow and maintain a clear and proper Climbing Space on the face of the Licensor Pole. Licensee's cable/wire Attachments shall be placed on the same side of the Pole as those of other Attaching Entities. In general, all other Attachments and Risers should be placed on Pole quarter faces. (See Drawing A-07.)
6. **Pedestals and Enclosures:** Every effort should be made to install Pedestals, Vaults and/or Enclosures a minimum of four (4) feet from Poles or other Licensor Facilities. In the event that the placement of Pedestals, Vaults and/or Enclosures a minimum of four (4) feet from Poles or other Licensor Facilities is not practical, Licensee shall contact the Licensor to obtain written approval of the proposed placement. Every effort should be made to install or relocate Licensor Facilities a minimum of four (4) feet from Licensee's existing Pedestals, vaults and/or enclosures.

C. Down Guys and Anchors

1. Licensee shall be responsible for procuring and installing all anchors and guy wires to support the additional stress placed on the Licensor's Poles by Licensee's Attachments. Anchors must be guyed adequately.
2. Anchors and guy wires must be installed on each Licensor Pole where an angle or a dead-end occurs. Licensee shall make guy attachments to Poles at or below its cable Attachment. No proposed anchor can be within four (4) feet of an existing anchor without written consent of Licensor.
3. Licensee may not attach guy wires to the anchors of Licensor or third-party user without the anchor owner's specific prior written consent.
4. No Attachment may be installed on a Licensor Pole until all required guys and anchors are installed. No Attachment may be modified, added to or relocated in such a way as will materially increase the stress or loading on Licensor Poles until all required guys and anchors are installed.
5. Licensee's down guys shall be bonded to ground wires of Licensor's Pole and insulated. The connections to the system neutral are to be made by the Licensor as an item of Make-Ready Work. Licensor will determine if guys should be grounded or insulated.

D. Certification of Licensee's Design

1. Except as allowed under Appendix G, the Licensee's Attachment Permit application must be signed and sealed by a professional engineer, registered in

the State of Washington, certifying that Licensee's aerial cable design fully complies with the NESC and Licensor's Construction Standards and any other applicable federal, state or local codes and/or requirements.

2. This certification shall include the confirmation that the design is in accordance with pole strength requirements of the NESC, taking into account the effects of Licensor's Facilities and other Attaching Entities' facilities that exist on the Poles without regard to the condition of the existing facilities.

E. Miscellaneous Requirements

1. **Cable Bonding:** Licensee's messenger cable shall be bonded to Licensor's Pole ground wire at each Pole. If no ground exists on a Pole, Licensor shall install a Pole ground as part of the make-ready work (See Drawings A-03 and A-04.)
2. **Customer Premises:** Licensee's service drop into customer premises shall be protected as required by the most current edition of the NEC.
3. **Communication Cables:** All Communications cables/wires not owned by Licensor shall be attached within the Communications space that is located 40 inches below the lowest Licensor conductors. (See Drawings A-01 through A-08.)
4. **Riser Installations:** All Licensee's Riser installations shall be in Licensor-approved conduit materials and placed on stand-off brackets. (See Drawings A-02 to A-04.)
5. **Tagging:** Licensee's fiber cables shall be identified with a communications cable tag or other identification acceptable to Licensor at each Attachment within twelve (12) inches of the Pole. The communications tag shall be consistent with communication industry standards and shall include at least the following: licensee name, and cable type. Tags shall be placed in such a way as to permit identification of Attaching Entity by observation from the ground.

F. Licensor Construction Drawings and Specifications

1. Refer to the attached Licensor Construction Drawings, and obtain additional construction specifications from Licensor in accordance with its requirements.
2. Apply the Licensor's construction drawings and specifications in accordance with the NESC, NEC and any other federal, state or local code requirements.

APPENDIX E—DISTRIBUTION LINE MINIMUM DESIGN REVIEW INFORMATION AND WORKSHEET

The following guidelines are provided, and corresponding information must be submitted with each Permit application for Pole Attachments on Licensor's system. Licensor may direct that certain Attachments do not require the submittal of Design Review Information. These Attachments are noted at the end of this section.

Each Permit application must include a report from a professional engineer registered to practice in the State of Washington, and experienced in electric Utility system design, or a Licensor-approved employee or contractor of Licensee. This report must clearly identify the proposed construction and must verify that the Attachments proposed will maintain Licensor's compliance with NESC Class B construction for medium loading as outlined in the NESC Section 25.

Licensor may or may not require that all of the following information be submitted at the time of the Permit application. The applicant shall have performed all required calculations and be ready to provide the detailed information below within fifteen (15) calendar days of notice. Applicant shall keep copies of the engineering data available for a period of twenty (20) years.

Lessee shall comply with any NESC and/or Licensor safety factors; whichever is more conservative, in their designs. The engineer for the Permit applicant shall provide for each application the following confirmations:

- Required permits that have been obtained (insert n/a if not applicable):

_____ (y/n) U.S. Corp of Engineers.
_____ (y/n) Highway—state, county, city.
_____ (y/n) Railroad.
_____ (y/n) Local zoning boards, town boards, etc.
_____ (y/n) Joint use permits, if required.

- Confirm that you have:

_____ (y/n) Obtained appropriate franchise(s).
_____ (y/n) Obtained pole/anchor easements from land owners.
_____ (y/n) Obtained crossing and overhang permits.
_____ (y/n) Obtained permit to survey R/W.

- _____ (y/n) Completed State of Washington Department of Transportation requirements.
- _____ (y/n) Placed permit number on plans.
- _____ (y/n) Complied with Washington State Underground Facility Location requirements.
- _____ (y/n) Included sag/tension data on proposed cable.

Calculations are based upon the latest edition of the NESC and the latest editions of the requirements of the State of Washington.

It is Licensee's responsibility to obtain all necessary permits and provide the Licensor with a copy of each if requested.

The engineer for the Permit applicant shall provide for each Pole(s) the following information: Note: Items marked with an * are required, other items are as requested by Licensor.

General:*

- Project ID _____
- Pole number _____ [if pole tag missing, contact Licensor]
- Pole class _____ [existing—i.e., 4, 3, 2...]
- Pole size _____ [existing—i.e., 35, 40...]
- Pole type _____ Western Red, Cedar, Douglas Fir...]
- Pole fore span _____ [feet]
- Pole back span _____ [feet]
- Calculated bending moment at ground level _____ [ft-lbs]

Proposed:

- Proposed cables _____ qty of _____ dia @ _____ ft above ground line*
- Proposed cables _____ qty of _____ dia @ _____ ft above ground line*

AGL = Above Ground Level

The minimum vertical clearance under all loading conditions measured from the proposed cable to ground level on each conductor span shall be stated above. Variations in

topography resulting in ground elevation changes shall be considered when stating the minimum vertical clearance within a given span.

Proposed loading data [provide similar data for each cable proposed]:*

A. Weight data (cable and messenger)

1. Vertical weight, bare = _____ [#'/ft]

B. Tension data (final tensions on messenger)

1. NESC maximum load for area of construction: _____ [lbs]

2. 60° F, NO wind: _____ [lbs]

Permit applicant's engineer shall provide for each transverse guy, or dead end to which guys and/or anchors are attached, the following information:*

- Pole number _____
- Calculated cable messenger tension under NESC maximum loading conditions _____ [lbs]

APPENDIX F—FIELD DATA SUMMARY SHEET INSTRUCTIONS

<u>Column</u>	<u>Instructions</u>
Licensors Pole Number	If a Pole stencil is not in place, it may be left for Licensors if the accompanying sketch is adequate to determine the Location.
Licensee's Plan Sheet Pole Number	This must correspond with the plan sheet or Pole Sketch Pole identification number.
Pole Height and Class	List the present Pole height and class and list the proposed Pole height and class if it is necessary for Licensors to replace the Pole for clearance, etc.
Guy Attachments	All unbalanced loading on Poles must be guyed. Attachments to Licensors's anchors will only be allowed if approved by Licensors.
Attachment Height	Licensee attachment height above ground level. List guy lead in feet.
Inches Below Licensors	The number of inches Licensee is to be attached below Licensors while maintaining clearance as required in Appendix D.
Span Length	List the back span length for each attachment.
Inches Sag	List the messenger sag for the design listed on the cover sheet at 60 degrees Fahrenheit.
Ground Clearance	List the ground clearance at the low point of the back span. Must not be less than the National Electrical Safety Code (latest edition).

APPENDIX G

LICENSEE IN GOOD STANDING

Concept

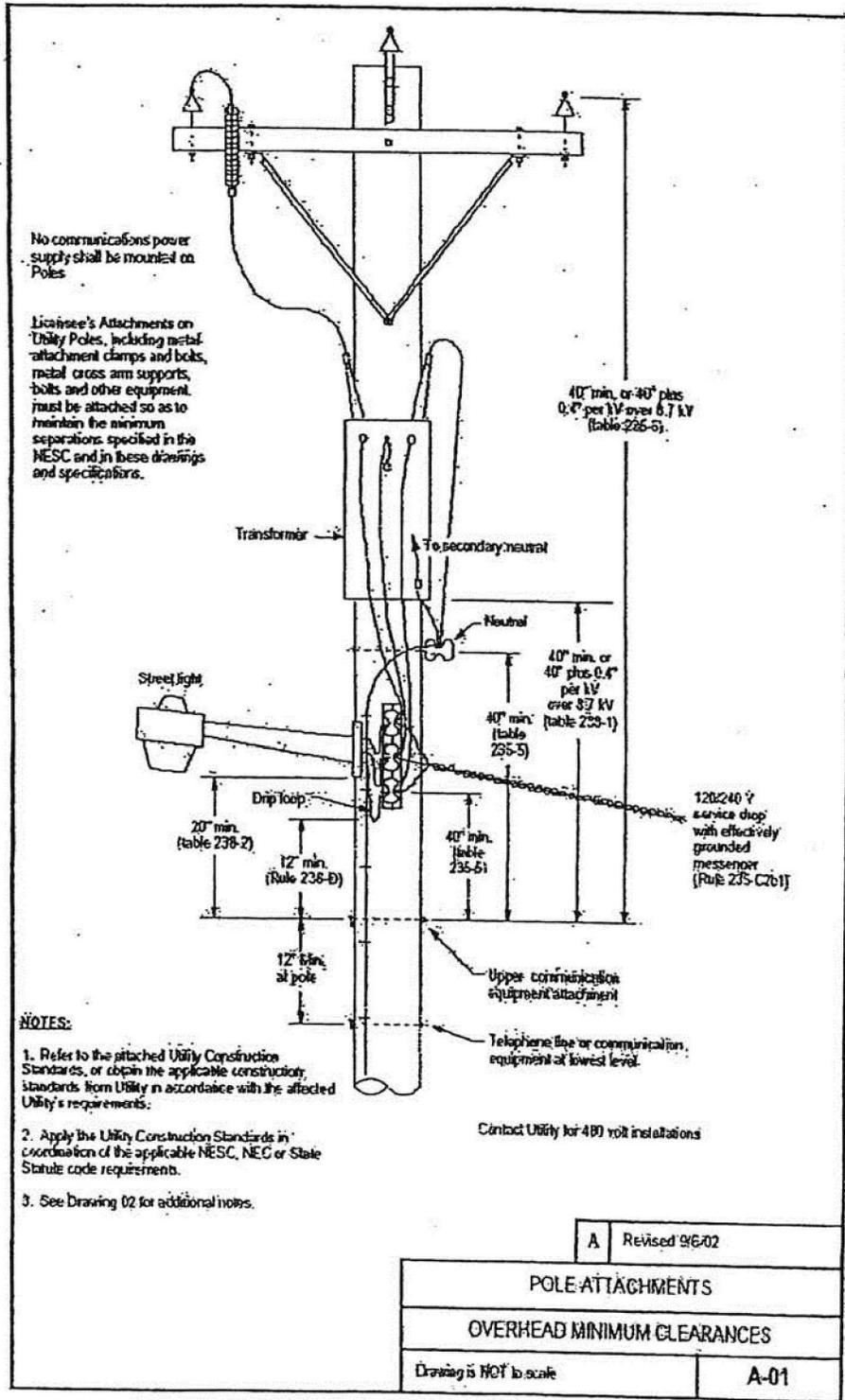
In order to facilitate the installation and attachment of Licensee equipment upon Licensor's poles and in order to assure that the Licensor's requirements for Permit subject to this Agreement are met, the Licensor has created the concept of the "Licensee in Good Standing" (LGS). The intent is to provide a streamlined permitting process by issuing an LGS certification, which will certify that the Licensee is complying with all provisions in this Agreement. This certification will allow a LGS Licensee to install any Attachments on any Pole subject to Article 6 - Permit and Application Procedures without having met the requirements of Paragraph 6.3 - Professional Certification and Paragraph 6.4 - Licensor Review of Permit Application. The LGS Licensee will inspect its own work and will certify that all work is done in accordance with this Agreement.

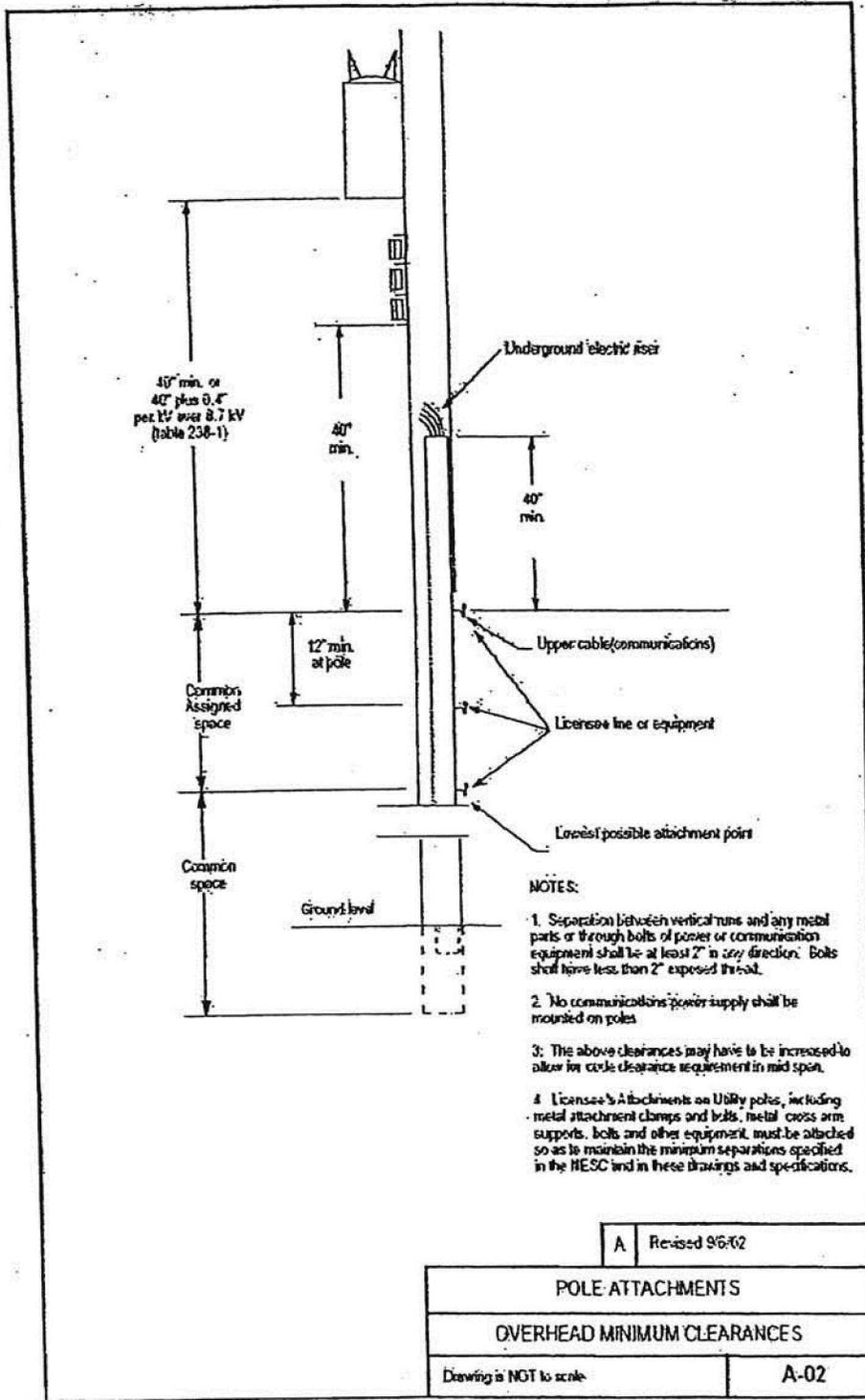
Certification

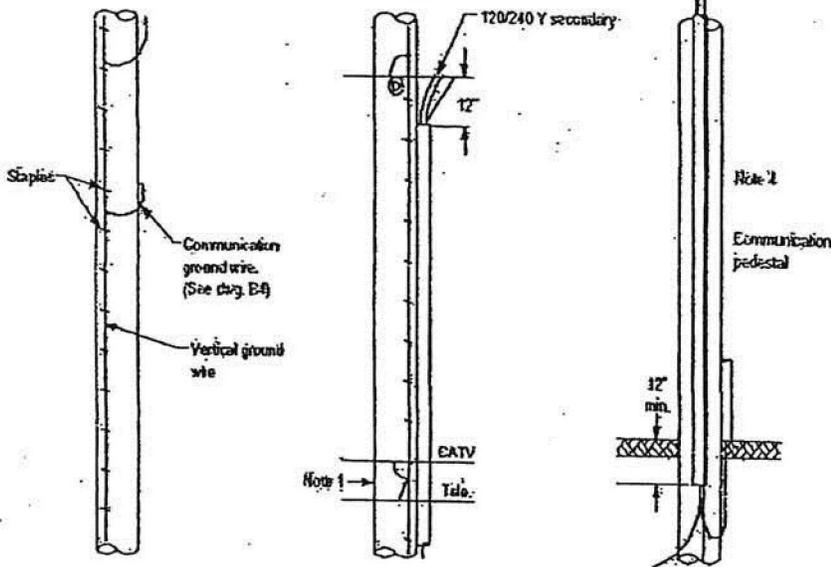
Initially, all Licensees are eligible to apply for LGS certification. Thereafter, all Licensees that have less than three written notifications of non-compliance of the provisions in this Agreement during the preceding 12 months, upon written request to the Licensor, will be eligible to receive a certificate for a Licensee in Good Standing if approved by the Licensor. After an evaluation of the Licensee's performance in complying with the Licensor's policies and requirements, the Licensor will issue a LGS certificate which will remain in effect for the length of the Agreement or until revoked.

Revocation

A LGS Licensee may have its LGS certification revoked at any time for non-compliance with Licensor's engineering requirements and/or construction standards resulting in safety hazards upon written notice by the Licensor. The LGS certification will be automatically revoked after three written notifications of non-compliance with this Agreement within a 12-month period. The revocation will remain in effect until such time as the requirements described above are met, at which time the Licensee may reapply to the Licensor to reissue the LGS certification, which will not be unreasonably withheld.







No communications power supply shall be mounted on Poles

Licensee's Attachments on Utility Poles, including metal attachment clamps and bolts, metal cross arm supports, bolts and other equipment must be attached so as to maintain the minimum separations specified in the HESC and in these drawings and specifications.

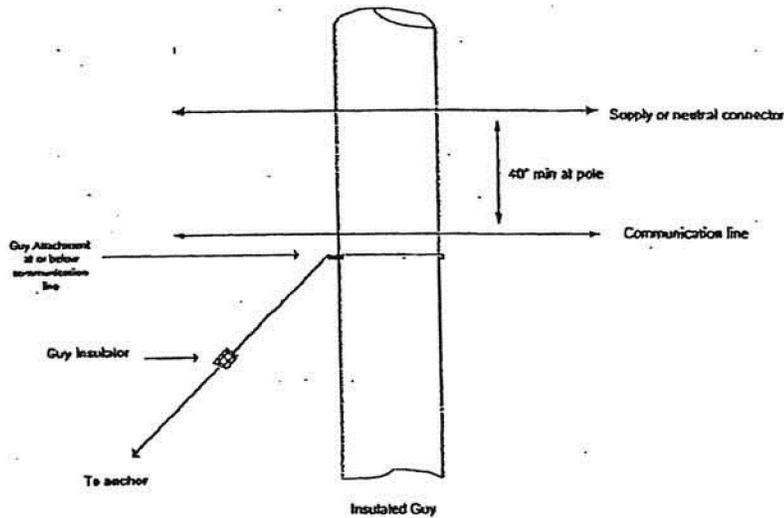
See Drawing #5

NOTES:

1. Licensee shall bond to Utility pole ground wherever Utility has a down ground on the pole. If the ground is under the metal U-guard, contact Utility to make the ground-connection.
2. If no pole ground exists, the Utility will install a pole ground on the pole.
3. Bond wire shall be #6 bare copper or larger. If bond wire is unsupported for more than 12" long, staple to pole.
4. When communication's are underground, the power is overhead and it is required that the communications ground be interconnected to the power supply ground, the connection shall be made below grade.
5. In no case shall Licensee ground be connected to guywires.
6. If a neutral isolation device is installed on the pole the attachor must contact Utility for special grounding instructions.
7. Licensee's messenger cable shall be bonded to Utility's pole ground wire at each pole.

A	Revised 9/6/02
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POLE ATTACHMENTS	
GROUNDING CONNECTIONS	
Drawing is NOT to scale	A-03



NOTES:

1. Licensee shall be responsible for procuring and installing all anchors and guy wires to support the additional stress placed on Licensor's poles by Licensee's Attachments.
2. Anchors and guy wires must be set on each Utility pole where there is a turn or angle and on all dead-end Utility poles.
3. Licensee may not place guy wires on the anchors of Licensor or Third Party User without prior written consent of all attaching entities and anchor owners.
4. No Attachment may be installed on a Utility pole until all required guys and anchors are installed, nor may any Attachment be modified or relocated in such a way as will materially increase the stress or loading on Utility poles until all required guys and anchors are installed.
5. Licensee's down guys shall not be bonded to ground or neutral wires of Licensor's pole and shall not provide a current path to ground from the pole ground or power system neutral.

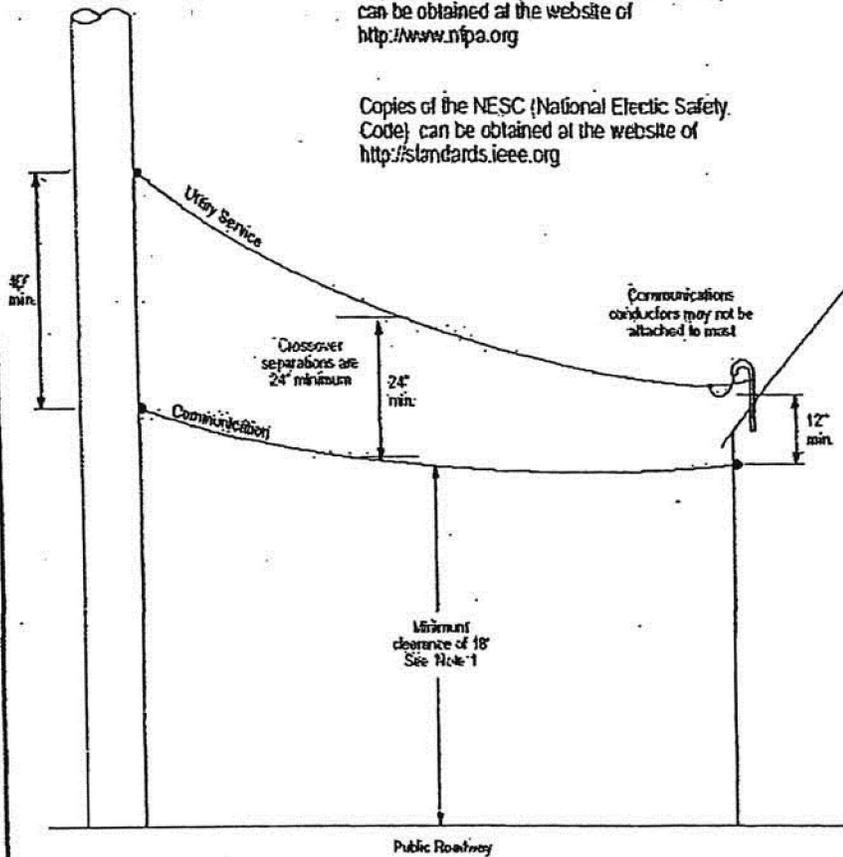
No communications power supply shall be mounted on poles.

Licensee's Attachments on Licensor's Poles, including metal attachment clamps and bolts, metal cross arm supports, bolts and other equipment must be attached so as to maintain the minimum separations specified in the NESC and in these drawings and specifications.

A	Revised 9/6/02
POLE ATTACHMENTS	
GUY WIRE REQUIREMENTS	
Drawing is NOT to scale	A-04

Copies of the NEC (National Electrical Code) can be obtained at the website of <http://www.nfpa.org>

Copies of the NESC (National Electric Safety Code) can be obtained at the website of <http://standards.ieee.org>



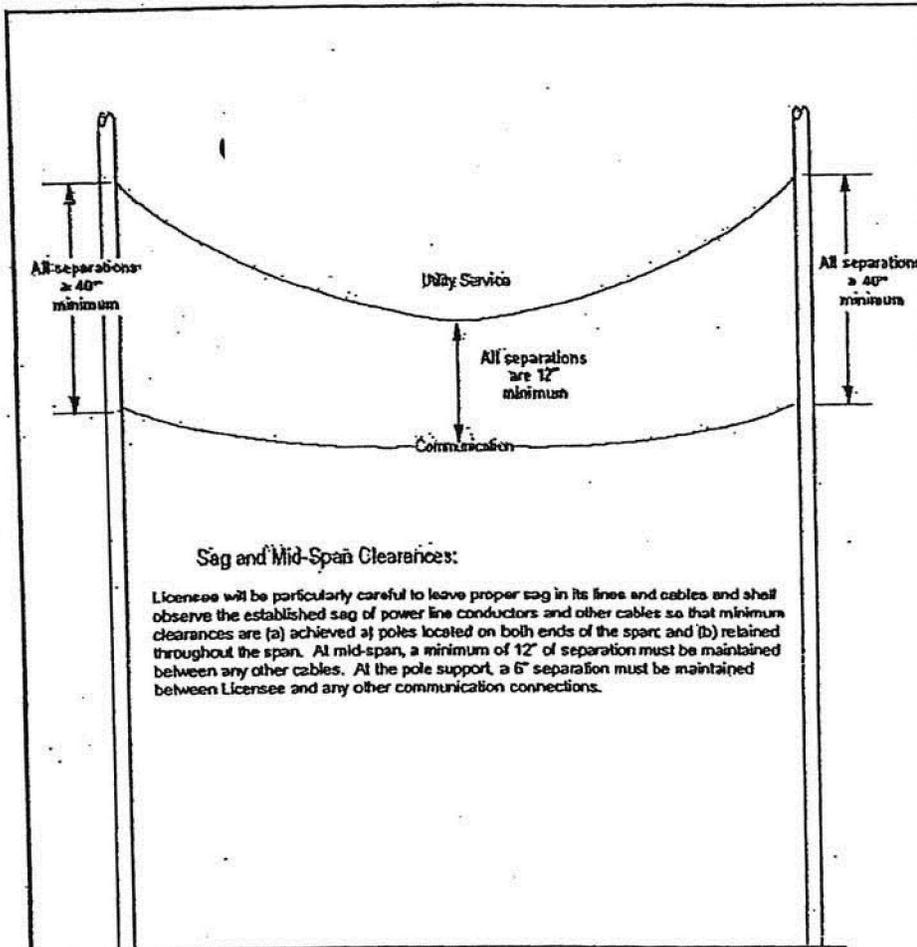
NOTES: (The NESC changes every three years, the clearances noted below have limiting conditions and may change. Refer to Section 232 of the NESC for latest requirements.)

1. Maintain minimum clearance
 - a) Railroads - 24'
 - b) Interstate - Contact State for specific requirements
 - c) Driveways - 16'
 - d) Walkways - 12'
2. Reference NESC clearances on same supporting structures
 - a) Section 235
 - b) Section 236
3. Reference NESC clearances on different supporting structures
 - a) Section 233

No communications power supply shall be mounted on poles.

Licensee's Attachments on Utility Poles, including metal attachment clamps and bolts, metal cross arm supports, bolts and other equipment, must be attached so as to maintain the minimum separations specified in NESC and in these drawings and specifications.

A	Revised 9/6/92
POLE ATTACHMENTS	
MINIMUM CLEARANCE TO SERVICE AND ROADWAY	
Drawing is N5T to scale	A-05



Copies of the NEC (National Electrical Code) can be obtained at the website of <http://www.nfpa.org>

Copies of the NESC (National Electric Safety Code) can be obtained at the website of <http://standards.ieee.org>

No communications power supply shall be mounted on poles

Licensee's Attachments on Utility Poles, including metal attachment clamps and bolts, metal cross arm supports, bolts and other equipment, must be attached so as to maintain the minimum separations specified in the NESC and in drawings and specifications.

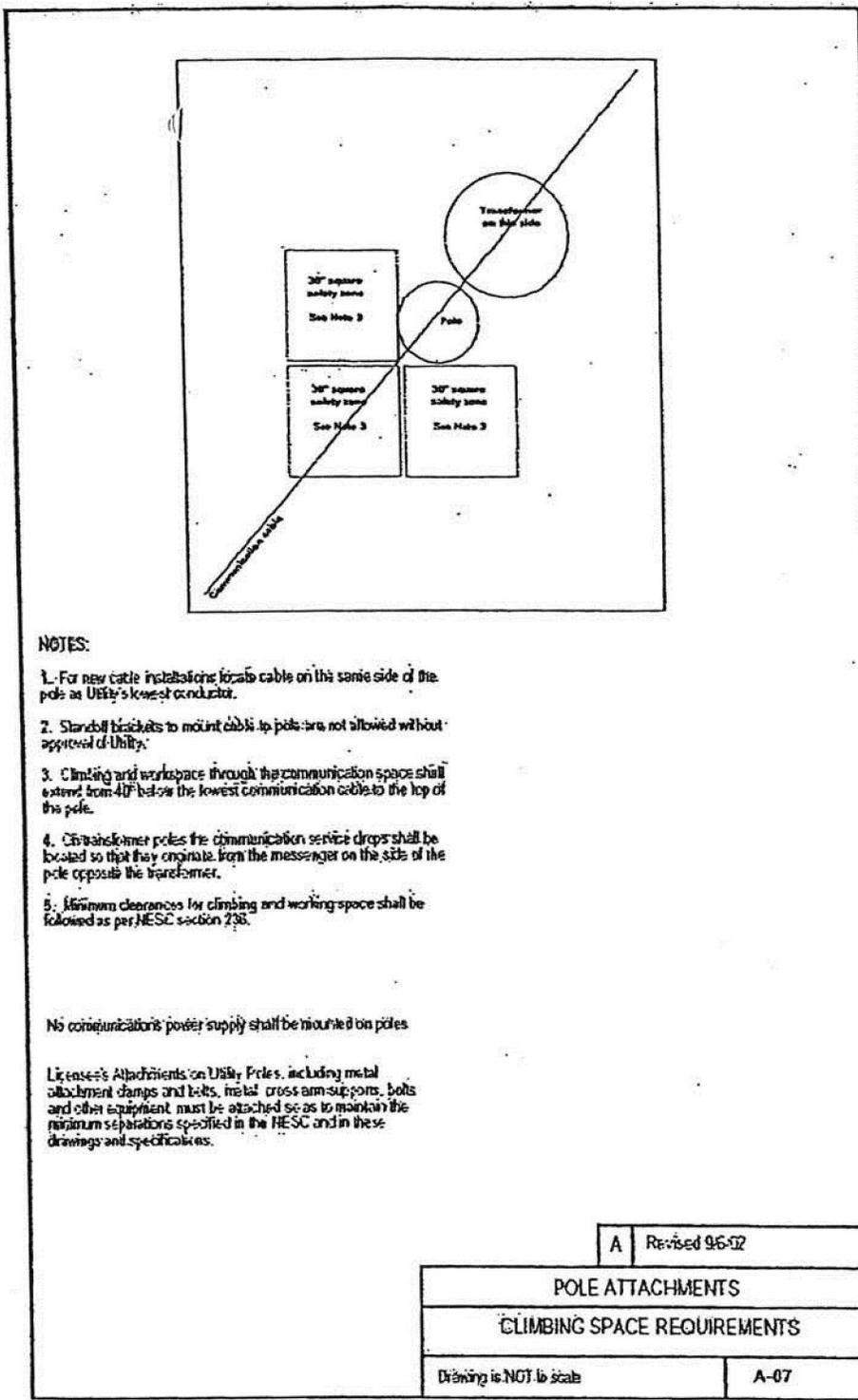
A Revised 9/6/02

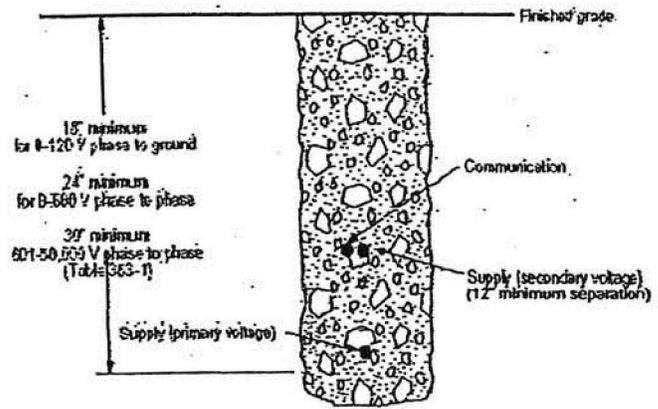
POLE ATTACHMENTS

MIN. CLEARANCE BETWEEN CIRCUITS

Drawing is NOT to scale

A-06





DIRECT BURIED SEPARATION

NOTES:

1. Communications equipment shall meet requirements of NESC 354D.
2. Communications cables shall be random laid with primary and secondary cables as specified in NESC 354D.
3. The bonding conductor required in NESC shall be provided as part of the communications pedestal installation. A communications bonding conductor clamp of sufficient length for fastening into the supply pedestal transformer neutral conductor shall be provided.
4. Installation may be by plowing, trenching, or by other means as conditions warrant.

A	Revised 9/6/02
POLE ATTACHMENTS	
JOINT CABLE INSTALLATION	
Drawing is NOT to scale	A-08